(1)

91-1331

No.

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PIPEFITTERS' ASSOCIATION LOCAL UNION NO. 597,

Petitioner,

v.

FRANK DANIELS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN B. VARICK
Counsel of Record
McBRIDE, BAKER & COLES
500 West Madison Street
40th Floor
Chicago, Illinois 60606
(312) 715-5700

HUGH J. McCARTHY, JR.
HUGH J. McCARTHY & ASSOCIATES
35 East Wacker Drive
Suite 1960
Chicago, Illinois 60601
(312) 372-8588

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

When a jury has entered a general verdict for Plaintiff without distinguishing among several alternative claims or causes of action, and the reviewing court finds reversible error as to one, but not all, of those claims, must the reviewing court:

(a) remand for a new trial because the jury may have relied solely on the tainted claim, as required by this Court and the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Tenth and District of Columbia Circuits; or

(b) affirm unless there was error on each and every claim, as required in the Seventh Circuit; or

(c) apply a four part test established by the Ninth Circuit to determine whether to affirm or remand?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	2
Statement of the Facts	2
REASONS FOR THE ALLOWANCE OF THE WRIT	5
THE SEVENTH CIRCUIT'S DECISION THAT A GENERAL VERDICT SHOULD BE AFFIRMED UNLESS THERE IS ERROR AS TO EACH OF PLAINTIFF'S CLAIMS IS DIRECTLY CONTRARY TO DECISIONS OF THIS COURT AND EVERY OTHER CIRCUIT	5
A. The Seventh Circuit Found Reversible Error On One Of Several Alternative Claims, But Affirmed Nonetheless	5
B. The Seventh Circuit's Decision Is Directly Contrary To This Court's Decisions ..	7
C. The Seventh Circuit's Decisions Create A Conflict In The Circuits	7
D. The Conflict Created By The Decision Below Is Sufficiently Important That *Certiorari* Is Appropriate	11
CONCLUSION	13

APPENDIX

PAGE

Seventh Circuit Opinion Affirming Judgment, September 30, 1991 ..... App. 1

Seventh Circuit Judgment, September 30, 1991 .. App. 36

Seventh Circuit Order Denying Defendant's Petition for Rehearing, October 30, 1991 ..... App. 32

Memorandum Opinion of District Court Denying Defendant's Motions and Entering Judgment for Plaintiff ..... App. 38

TABLE OF AUTHORITIES

Cases	PAGE
Asbill v. Housing Authority of the Choctaw Nation, 726 F.2d 1499 (10th Cir. 1984)	10, 11
Bandura v. Orkin Exterminating Co., 865 F.2d 816 (7th Cir. 1988)	8
Borger v. Yamaha Int'l Corp., 625 F.2d 390 (2d Cir. 1980)	8
Brocklesby v. United States, 767 F.2d 1288 (9th Cir. 1985), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986)	8, 10
Carden v. Westinghouse Electric Corp., 850 F.2d 996 (3d Cir. 1988)	8
City of Columbia v. Omni Outdoor Advertising Co., Inc., ___ U.S. ___, 111 S.Ct. 1344 (1991)	7
Collum v. Butler, 421 F.2d 1257 (7th Cir. 1970)	8
Cross v. Ryan, 124 F.2d 883 (7th Cir. 1941), *cert. denied*, 316 U.S. 682 (1942)	8, 9
Daniels v. Pipefitters Ass'n Local 597, 945 F.2d 906 (7th Cir. 1991)	8
Doherty v. American Motors Corp., 728 F.2d 334 (6th Cir. 1984)	8
Dudley v. Dittmer, 795 F.2d 669 (8th Cir. 1986)	8
Ely v. Blevins, 706 F.2d 479 (4th Cir. 1983)	8
Farrell v. Klein Tools, Inc., 866 F.2d 1294 (10th Cir. 1989)	8, 9, 11
Grant v. Preferred Research, Inc., 885 F.2d 795 (11th Cir. 1989)	8
Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989)	8
Kern v. Levolor Lorentzen Inc., 899 F.2d 772 (9th Cir. 1990)	9, 10

Kicklighter v. Nails By Jannee, Inc., 616 F.2d 734 (5th Cir. 1980) 8

Lawndale Nat'l Bank v. American Casualty Company, 489 F.2d 1384 (7th Cir. 1973) 8, 9

Maryland v. Baldwin, 112 U.S. 490 (1884) 7

McGrath v. Zenith Radio Corp., 651 F.2d 458 (7th Cir.) *cert. denied sub nom. Zenith Radio Corp. v. McGrath*, 454 U.S. 835 (1981) 8, 9

McMurray v. Deere and Co., 858 F.2d 1436 (10th Cir. 1988) 11

Murphy v. Dyer, 409 F.2d 747 (10th Cir. 1969) .. 9

Murphy v. United States, 653 F.2d 637 (D.C. Cir. 1981) 7, 8

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Company, 370 U.S. 19 (1962) 7

United New York and New Jersey Sandy Hook Pilots Ass'n. v. Halecki, 358 U.S. 613 (1959) .. 7

Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907) 7

Secondary Authorities

Sunderland, "Verdicts, General and Special," 29 *Yale L.J.* 253 (1920) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PIPEFITTERS' ASSOCIATION LOCAL UNION NO. 597,

Petitioner,

v.

FRANK DANIELS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, dated September 30, 1991, is found in the Appendix hereto at pages 1 through 35 and is reported at 945 F.2d 906, 57 Fair. Empl. Prac. Cas. (BNA) 128, 57 Fair. Empl. Prac. Dec. (CCH) ¶41034, 138 L.R.R.M. (BNA) 2576, 120 Lab. Cas. (CCH) ¶10999 (7th Cir. 1991). It reviewed the opinion of the District Court which is found in the Appendix hereto at pages 38 through 70 and is reported at 53 Fair. Empl. Prac. Cas. (BNA) 1669, 135 L.R.R.M. (BNA) 2534 (N.D.Ill. 1990).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit, decided September 30, 1991. A Petition for Rehearing was timely filed, and rehearing was denied on October 30, 1991. Appendix p. 37. Consequently, this Court has jurisdiction to review the judgment in question by writ of certiorari, pursuant to 28 U.S.C. §1254.

STATEMENT OF THE CASE

Statement of the Facts

Plaintiff, Frank Daniels, is an African-American member of Defendant, Pipefitters Association Local Union No. 597 ("Local 597"). App.p.40. Local 597 is a local union representing pipefitters and welders in a number of counties in northern Illinois and northeastern Indiana. App.p.40.

Local 597 is a signatory to an agreement with the Mechanical Contractor's Association that gives to contractor/employers the absolute right to hire employees without regard to union membership and without regard to union referral. Pl. Ex. 11; App.p.41. As a result, the vast majority of the members of Local 597 obtain their employment by contacting employers directly without intervention or assistance of Local 597. Tr. 65, 1732, 1782. A small portion of the membership, however, and a small number of contractors, use a job information system established by Local 597. *id.* Under this system, contractors who need pipefitters contact Local 597, seeking the names of unemployed pipefitters or welders. Local 597, in turn, maintains a room at its union hall where persons looking for information about pipefitting or welding jobs can come (the "Information Hall"). App.p.39. When a contractor calls

Local 597 with a request for a certain number of potential employees, Local 597 allocates that information among those who are present in the Information Hall.

This case primarily concerned Local 597's allocation of that job information. Local 597 witnesses testified that they allocated information about potential jobs on a random basis. Tr. 1483. Plaintiffs' witnesses, on the other hand, testified that Local 597's representatives discriminated against either African-Americans or those who had complained about discrimination.

In 1984, Daniels was involved in a physical altercation with one of Local 597's Business Agents. Tr. 401. As a result of this altercation, Local 597 proffered charges against Daniels according to its own internal procedures, and expelled him. Pl. Ex. 10.

Out of these facts, Daniels submitted three claims to the jury. First, Daniels claimed that he had been denied job information because he was black, and that this denial violated 42 U.S.C. §1981. Second, he claimed that he had been expelled, not because of the physical altercation with a Business Agent, but because he had filed charges against the Union. He claimed that this, too, violated §1981. Third, he claimed that Local 597's denial of job information to him was a violation of §301 of the Labor Management Relations Act (29 U.S.C. §185). In addition to these three claims which were submitted to the jury, Daniels alleged that the same conduct also violated Title VII of the 1964 Civil Rights Act for which there was no right to a jury. 42 U.S.C. §2000e-2.

The jury was instructed to return a general verdict either for Plaintiff or for Defendant without separation among Plaintiff's claims. Consequently, the jury was instructed that if it were to find for plaintiff on any of his

three claims, it should return a verdict for Plaintiff and award damages. The jury apparently did find for Plaintiff on at least one of his claims because it returned a verdict for Plaintiff. Because of the general verdict, however, it is impossible to know which of the Plaintiff's claims the jury accepted. Perhaps the jury found for Plaintiff on each of his claims; perhaps the jury found for him on only one. One simply cannot tell. Believing himself to be bound by the verdict under §1981, the District Judge entered judgment also under Title VII.

On appeal, Local 597 challenged each of the three alternative claims presented to the jury. Local 597 claimed, *inter alia*: (1) that §1981 covers only the "making" and "enforcement" of contracts and does not reach the allocation of job information, which may or may not lead to a job; (2) that § 1981 does not prohibit the allegedly retaliatory expulsion because, *inter alia*, discrimination against those who file charges—as distinguished from discrimination on the basis of race—is not covered by §1981; and (3) that §301 does not apply to internal union affairs.[1] The Seventh Circuit rejected Local 597's arguments with respect to Plaintiff's first and third claims. The Court below agreed with Local 597, however, that §1981 relates only to racial discrimination, not discrimination against those who file charges. Notwithstanding this, the Court of Appeals affirmed the jury verdict below.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §1331, there being a federal question raised under three federal statutes: 42 U.S.C. §1981, 42 U.S.C. §2000e-2, and 29 U.S.C. §185.

---

[1] In addition, Local 597 challenged a number of evidentiary rulings, which the Court of Appeals did not address.

REASONS FOR THE ALLOWANCE OF THE WRIT

THE SEVENTH CIRCUIT'S DECISION THAT A GENERAL VERDICT SHOULD BE AFFIRMED UNLESS THERE IS ERROR AS TO EACH OF PLAINTIFF'S CLAIM, IS DIRECTLY CONTRARY TO DECISIONS OF THIS COURT AND EVERY OTHER CIRCUIT.

A. The Seventh Circuit Found Reversible Error On One Of Several Alternative Theories, But Affirmed Nonetheless.

On at least one point, the Seventh Circuit held that the District Court erred. Plaintiff's claim of retaliatory expulsion was not actionable under §1981 unless the jury found that the expulsion was racially motivated. But the District Court instructed the jury that Local 597 was liable under §1981 even if there were no racial motivation. App. pp. 19-20. Consequently, it is quite possible that the jury found no racial motivation, but believed it must find for the Plaintiff under §1981, nonetheless, if it found merely that Defendant retaliated against him for filing charges against the Union. The Seventh Circuit recognized the District Court's error.

> As noted above, this Court's decision in *McKnight*, recognized that the retaliation itself must be racially motivated. The jury instruction here does not require the jurors to make this additional finding in evaluating the retaliation claim. Thus, if retaliation were the only basis on which the jury entered its verdict in favor of *Daniels*, we would remand the retaliation claim to the jury for reconsideration in light of the law as it is changed since *Patterson*.

App.p.20. As to this claim, the Court noted,

> It would, of course, be up to the jurors to weigh the evidence presented by the Plaintiff to determine whether it supported liability under Section 1981 for retaliation.

App.p.22.

The Court of Appeals did not remand this case for such consideration by the jury, however. Instead, it affirmed, notwithstanding the error. The Court held that the error as to one of Plaintiff's alternative claims did not require reversal because the jurors may have found for Plaintiff on one of his other claims:

> Local 597's interference with Plaintiff's ability to enter into contracts with employers suffices to uphold the general verdict of liability under Section 1981.

App.p.16. Similarly, the court below noted the following:

> Local 597's discrimination in the formation of contracts with employers and discrimination in enforcement of the collective bargaining agreement, provide independent bases for affirming the finding of liability under Section 1981.

App.p.20.

The Court of Appeals could not possibly know whether the jury had found for Plaintiff on one of the untainted claims, or solely on the claim under which it was erroneously instructed.[2] Yet it affirmed. The Seventh Circuit held that, where the jury returns a general verdict upon several causes of action, the court may reverse and remand only if it finds error as to each and every one of those claims. That holding is contrary to the law as it has been described repeatedly by this Court, and by the Courts of Appeals for every other circuit.

[2] Indeed, it is quite likely that the jury found for the Plaintiff only under the retaliation claim, because the principal testimony regarding racial discrimination came from a witness whose testimony was incredible—so incredible that the witness later admitted that his testimony had been perjured. That evidence of perjury was the subject of a motion under Rule 60(b) that was denied and is under appeal in the Seventh Circuit.

B. The Seventh Circuit's Decision Is Directly Contrary To This Court's Decisions.

In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Supreme Court considered the precise issue the Seventh Circuit has now decided erroneously. There, the jury had returned a general verdict upon several causes of action. The court held that the instruction as to one of those claims was erroneous. Although there was no error as to the other bases of liability, it was necessary to remand the case for a new trial, because the court was unable to determine which claim had been accepted by the jury. The jury may have reached its verdict solely on the basis of the cause of action as to which the error had been committed.

This rule was articulated over a hundred years ago by this Court in *Maryland v. Baldwin*, 112 U.S. 490 (1884). *Accord, Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). It was repeated by this Court thirty years ago, *United New York and New Jersey Sandy Hook Pilots Ass'n. v. Halecki*, 358 U.S. 613, 619 (1959); and it is still the law today. *City of Columbia v. Omni Outdoor Advertising Co., Inc.*, ___ U.S. ___, 111 S.Ct. 1344, 1356 (1991). As this Court held in *Maryland v. Baldwin*,

> [The verdict's] generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the Court, the verdict cannot be upheld. . . ."

112 U.S. 490, 493.

C. The Seventh Circuit's Decisions Create A Conflict In The Circuits.

The rule of *Maryland v. Baldwin* and *Sunkist Growers* is followed in every circuit other than the Seventh. *Mur-*

phy v. United States, 653 F.2d 637, 646 (D.C. Cir. 1981); *Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989); *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390 (2d Cir. 1980); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1000-1, 1007 (3d Cir. 1988); *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *Kicklighter v. Nails By Jannee, Inc.*, 616 F.2d 734 (5th Cir. 1980); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984); *Dudley v. Dittmer*, 795 F.2d 669, 673-4 (8th Cir. 1986); *Brocklesby v. United States*, 767 F.2d 1288, 1294 (9th Cir. 1985), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986); *Farrell v. Klein Tools*, 886 F.2d 1294, 1299-1301 (10th Cir. 1989); *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 800 (11th Cir. 1989).

Yet, the Seventh Circuit has chosen a rule which is directly contrary to the established law. The Seventh Circuit's decision in this case is not its only repudiation of the rule of *Maryland v. Baldwin* and its progeny. With one exception, each time that this issue has arisen, the Seventh Circuit has articulated a rule contrary to the law. *Daniels v. Pipefitters Ass'n Local 597*, 945 F.2d 906 (7th Cir. 1991); *Bandura v. Orkin Exterminating Co.*, 865 F.2d 816, 820-1 (7th Cir. 1988)[3]; *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir.) *cert. denied sub nom. Zenith Radio Corp. v. McGrath*, 454 U.S. 835 (1981); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *Cross v. Ryan*, 124 F.2d 883, 887 (7th Cir. 1941), *cert. denied*, 316 U.S. 682 (1942). *But see Lawndale Nat'l Bank v. American*

[3] *Bandura* purports to rely on both Illinois and federal law for this proposition. Illinois law, however, cannot be used to justify the result in the instant case because Plaintiff's claims were all based upon federal statutes.

Casualty Company, 489 F.2d 1384, 1388-9 (7th Cir. 1973) (remanding a case under the circumstances of the instant case, citing *Sunkist Growers*). The rule in the Seventh Circuit is that:

> [T]o triumph on appeal, defendants must show that under none of the [alternative claims] was plaintiff entitled to the award of compensatory and punitive damages.

McGrath, supra, 651 F.2d at 464. Or as it was first stated in *Cross v. Ryan*, "if there is substantial evidence to sustain any one count in favor of each plaintiff, the general verdict must be upheld." 124 F.2d at 887.

The Seventh Circuit does not acknowledge its repudiation of this Court's precedent. Indeed, the Seventh Circuit has cited *Sunkist Growers* only once, in the aberrational case of *Lawndale Nat'l Bank*. The other Courts of Appeals have recognized the Seventh Circuit's deviance, however. Thus, as one judge in the Ninth Circuit noted (in dissent):

> The Seventh Circuit, for reasons of its own, has adopted a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court. In order to win on appeal in the Seventh Circuit, the defendant must show that *none* of the plaintiff's theories will support the general verdict.

Kern v. Levolor Lorentzen Inc., 899 F.2d 772, 790 (9th Cir. 1990). *See also Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299 (10th Cir. 1989) (describing the Seventh Circuit's rule as inconsistent with its own); *Murphy v. Dyer*, 409 F.2d 747, 748 n.2 (10th Cir. 1969) (same).

While the Seventh Circuit is alone in announcing a rule exactly contrary to Supreme Court precedent, two other

circuits have suggested exceptions to the rule.[4] In the Ninth Circuit, there appears to be some ambiguity as to the court's duty when it finds error as to one of several alternative claims. Ordinarily, the rule is described even in the Ninth Circuit in absolute terms. *See Brocklesby v. United States*, 767 F.2d 1288, 1294 (9th Cir. 1985), *cert. denied sub nom. Jeppesen & Co. v. Brocklesby*, 474 U.S. 1101 (1986). On occasion, however, the rule is described as having an exception. Thus, in *Kern*, *supra*, the Ninth Circuit held that it had discretion to affirm notwithstanding error as to one of several claims submitted to a jury, and that it should exercise that discretion after considering the following:

> (1) the potential for confusion of the jury; (2) whether the losing party's defenses apply to the count upon which the verdict is being sustained; (3) the strength of the evidence supporting the count relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories.

Kern v. Levolor Lorentzen, Inc., 899 F.2d 772, 777 (9th Cir. 1990).

In 1984, the Tenth Circuit, too, suggested an exception to the absolute rule announced in *Maryland v. Baldwin*: that the court need not remand for error which was not "vital" (*Asbill v. Housing Authority of the Choctaw Na-*

---

[4] The First Circuit has suggested an exception for "harmless error" which is really not an exception at all, but is a description of the limits of the general rule. In *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1980), the Court of Appeals affirmed a general verdict notwithstanding error as to one of the claims because the jury's acceptance of the untainted claim necessarily determined liability under the claim as to which there had been error. Thus, the error could not conceivably have made a difference.

tion, 726 F.2d 1499, 1504 (10th Cir. 1984)). But the Tenth Circuit has since returned to the absolute rule required by this Court's decisions. *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1298-1301 (10th Cir. 1989); *McMurray v. Deere and Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988). In *Farrell*, for instance, the Court found it "highly unlikely that the jury's verdict was affected by the [erroneous] instruction . . ." but held, nonetheless, as follows:

> [B]ecause we cannot say with absolute certainty . . . that the jury was not influenced by the submission of the instruction, we must reverse and remand for a new trial.

866 F.2d 1298, 1301.

To summarize, while there is uncertainty in the Ninth Circuit (and there was previously uncertainty in the Tenth Circuit) as to whether to follow the absolute rule of *Maryland v. Baldwin* and *Sunkist Growers*, there is no uncertainty in the Seventh Circuit. That Court has unambiguously adopted a rule which is "precisely the opposite of that repeatedly announced by the Supreme Court." For that reason, this Court should grant *certiorari* to review the Seventh Circuit's decision and reconcile the inconsistency that Court has created.

D. The Conflict Created By The Decision Below Is Sufficiently Important To The Litigation Process That Certiorari Is Appropriate.

The decision below, if allowed to stand, creates serious problems for litigants, and its gravity transcends the instant case. First, it subverts the right to a jury trial granted by the Seventh Amendment. Local 597 had a right to have its liability determined by a jury that heard the evidence presented, not by the Court of Appeals. Where a jury returns a general verdict, the reviewing

court has no way of knowing whether its decision was reached solely on the basis of a claim as to which there is admitted error. Thus, it is quite possible that the jury found for Defendant below on each of Plaintiff's race claims, but found for Plaintiff solely on the basis of a claim that is not actionable under §1981. Under these circumstances, had the jury been properly instructed, it would have returned a verdict for Defendant. But the Seventh Circuit's abberant rule requires affirmance of the Plaintiff's verdict even though the jury would not have reached that result. It should be reversed.

Second, the Seventh Circuit's rule encourages litigants with multiple claims to request a general verdict. Special verdicts, or at least separate verdicts for separate claims, have long been encouraged, however. As one commentator described the problem with general verdicts,

> The peculiarity of the general verdict is the merger into a single individual *residuum* of all matters, however numerous, whether of law or fact. . . . No one but the jurors can tell what was put into it and the jurors will not be heard to say. The general verdict is as inscrutable and essentially mysterious as the judgment which was issued from the ancient oracle of Delphi.

Sunderland, "Verdicts, General and Special," 29 *Yale L.J.* 253 (1920).

Indeed, the instant case provides a clear demonstration of the inferiority of a general verdict. Had the jury returned special verdicts, the reviewing courts would know whether it had ruled for Plaintiff only on his retaliatory expulsion claim as to which the jury was erroneously instructed, or on a claim as to which the court below found no error.

Third, the Courts of Appeals are not free to fashion their own law on issues this Court has decided, particular-

ly when this Court has announced its rule unequivocally on five occasions. The Courts of Appeals must follow this Court's decisions. To allow them to do otherwise is to abandon the rule of law on which our system of justice is based. The Seventh Circuit has now announced a rule which is not only inconsistent with this Court's decisions, but is exactly contrary to this Court's teachings. And it has done so five times now. That simply cannot be allowed.

CONCLUSION

For all of these reasons—to say nothing of fundamental fairness to the litigants in the instant case—the Court should grant a writ of *certiorari* in order to review the Seventh Circuit's repeated and flagrant repudiation of settled law.

Respectfully submitted,

STEVEN B. VARICK
Counsel of Record
McBRIDE, BAKER & COLES
500 West Madison Street
40th Floor
Chicago, Illinois 60606
(312) 715-5700

HUGH J. McCARTHY, JR.
HUGH J. McCARTHY & ASSOCIATES
35 East Wacker Drive
Suite 1960
Chicago, Illinois 60601
(312) 372-8588

Attorneys for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-3124 and 90-3261

FRANK DANIELS,

Plaintiff-Appellee,
Cross-Appellant,

v.

PIPEFITTERS' ASSOCIATION
LOCAL UNION NO. 597,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 5224—**James H. Alesia,** *Judge.*

ARGUED JUNE 5, 1991—DECIDED SEPTEMBER 30, 1991

Before CUMMINGS and POSNER, *Circuit Judges,* and NOLAND, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* The backdrop to this case of individual racial discrimination is the historic resistance within the building trades in the Chicago area to accepting racial and ethnic minorities into their ranks. The plaintiff,

---

* The Honorable James E. Noland, Senior District Judge for the Southern District of Indiana, is sitting by designation.

Frank Daniels, is black. He was able to get his start as a pipefitter and welder on account of the Chicago Plan, a government-sponsored directive designed to increase minority representation in the construction industry.[1] Daniels left the building trade fourteen years later when he was expelled from his trade union, Pipefitters' Association Local Union Number 597. His abrupt departure was also predicated on race, but this time the union used his race against him rather than in his favor.

After he was expelled from Local 597, Daniels filed suit against the union. He charged the union with race discrimination and retaliation causing him to be denied job

---

[1] In its General Findings to the Chicago Plan, the United States Department of Labor explained the historic discrimination faced by minorities in the construction industry in the Chicago area. The Chicago Plan recognized that the construction industry's reliance on referrals by the construction craft unions accounted in large part for the underrepresentation of minorities:

> [M]inority workers * * * require action on the part of their government to ensure the enjoyment of equal employment opportunities necessitating action on a broad scale. The underutilization of minorities is due in substantial measure to the unique nature of employment practices in the construction industry where contractors and subcontractors rely on construction craft unions as their prime or sole labor source. Collective bargaining agreements and/or established custom and usage between construction contractors * * * and labor organizations frequently provide for or result in exclusive hiring halls. * * * As a result, referral by the labor organization is a virtual necessity for obtaining meaningful employment in union construction projects. Minorities have in the past and in some instances are still excluded from access to * * * certain construction trades. As a result of the foregoing, minority persons still do not enjoy full equal employment opportunities in the Chicago, Illinois area construction trades.
>
> It is further found that the previous efforts to correct this inequity have not been successful and that it is necessary * * * to adopt a specific program which will provide for equal employment opportunity in the * * * construction industry.

Chicago Plan, Plaintiff's Exhibit 14.

referrals and to be expelled from Local 597. Daniels alleged multiple legal theories and claimed relief under Section 1981 of the 1866 Civil Rights Act (42 U.S.C. § 1981), Section 301 of the Labor Management Relations Act (29 U.S.C. § 185), and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). His § 1981 and § 301 claims were tried before a jury, which returned a general verdict in Daniels' favor and awarded him compensatory damages of $181,063.50 and punitive damages of $150,000.00. The district court held a bench trial on plaintiff's Title VII claim and entered judgment in favor of Daniels. Plaintiff then petitioned for attorneys' fees and the district court awarded fees of $265,777.00 and costs in the amount of $6,312.10. For the following reasons, we affirm.

I. FACTS

A recitation of the racist slurs directed at the black members of Local 597 provides an introduction to the work environment that plaintiff protested against. When the federal government initiated the Chicago Plan and directed the union to accept additional blacks, the union's head complained that "big brother government came in and told us that we had to accept blacks and the rest of the minorities" (Tr. 1144). When a black pipefitter decided to run for a union position, the same union head complained that "this has been a white man's union * * *" (Tr. 810-812). Use of racial epithets by union officials pervaded the hiring hall. White members were told that they would not get jobs while they were "with those black people and with those niggers" (Tr. 1145-1146). Another official told the same white member that "You're just too friendly with the wrong kind of people * * *. You're always with those niggers, porch monkeys * * *" (Tr. 1146-1147). Blacks were referred to as "baboon[s]," "porch monkeys," "spear-chuckers," "ghetto assholes," "nigger," "super nigger," "melanzanni" (Italian for eggplant), and "tutsune" (Italian for nigger) (Tr. 1149-1150, 1152, 1154-1155).

Daniels entered this work environment in 1970 after graduating from the Greer Technical Institute in Norridge, Illinois, where he was trained and certified as a welder. Upon his entry into the workforce, Local 597 issued him a work permit and admitted him to full membership in the union in January 1973. He remained a member of the union in good standing until he was expelled on February 1, 1984. Daniels' discrimination claims sought damages for the period beginning on October 7, 1980, and ending June 20, 1985.

During his tenure as a member of Local 597, the plaintiff was a persistent critic of his union's racial hiring practices. He filed numerous complaints with the National Labor Relations Board, the Fair Employment Practices Commission, the Equal Employment Opportunity Commission, and the Illinois Department of Human Rights. All of these complaints concerned various incidents of racial discrimination and racial harassment. Dissatisfied with Local 597's discriminatory treatment of him, plaintiff paid his union dues under protest over a period of several years.

The union that Daniels joined, Local 597, is the exclusive bargaining agent for pipefitters and welders. It refers its members through a job referral service to the Mechanical Contractors' Association, an organization of contractors that employs welders and pipefitters. Local 597 operates the referral service out of the union hall ("information hall"). The arrangement whereby Local 597 refers its members to the contractors is governed by a contract—the Area Agreement. The Agreement specifically prohibits Local 597 from discriminating in referrals "because of race, color, national origin, creed, or sex" and requires the union to "advise applicants for work about available positions on a non-discriminatory basis" (Plaintiff's Exhibit 11, Article X, § 5).

Under the Area Agreement, contractors are under no obligation to hire exclusively through the job referral service operated out of the information hall. However, when the contractor hires a non-union employee, that person

must become a union member within seven days and must maintain union membership throughout the term of employment.

Daniels challenged three aspects of this hiring apparatus in his lawsuit. He challenged the referral system in place at Local 597 as racially discriminatory, alleging that it deprived him of job referrals; interfered with his ability to obtain work; and failed to represent him adequately in the grievance process. Plaintiff's second claim—for expulsion—rested on his view that the union retaliated against him because he had previously filed charges of racial discrimination against Local 597. Third, plaintiff brought what he called a § 301 claim for breach of the duty of fair representation. Under this rubric, plaintiff identified the discrimination in job referrals, his expulsion from the union, and the union's violation of the non-discrimination clauses of the Area Agreement.

A. *The Referral System*

Plaintiff challenged the job referral service that Local 597 operated pursuant to the Area Agreement. A contractor in need of welders or pipefitters informed Local 597 that it was hiring. The union official on duty at the information hall, the Business Agent, recorded the inquiry on a request sheet, selected the appropriate number of union members to refer to the job, and then recorded the referral on a dispatch sheet. The Business Agent limited the number of referrals to the number of workers requested. Local 597 covered a large jurisdiction[2] and its job referral system was an important source of jobs. Some contractors, including Phillips and Getschow, the largest contractor in the area, made a practice of hiring only those workers referred from the information hall. In the period from 1972, Local 597 employed, on the average,

[2] Local 597's jurisdiction covered Cook, Lake, Will, McHenry, and portions of Grundy, DuPage and Kane Counties in Illinois, and Lake, LaPorte, Porter, Newton and Jasper Counties in Indiana.

1,900 to 2,000 pipefitters and welders at any one time—at times fully one-third of Local 597's membership.

Despite the importance of the referral service to the hiring of pipefitters and welders, Local 597 had no written rules for the operation of the referral system. In theory, jobs through the referral service were given out on a first-come, first-serve basis to the union members on hand at the information hall, and then on a random basis to other members. In practice, the referral service operated much differently.

The Local 597 Business Agents responsible for doling out the work opportunities maintained a blacklist containing the names of those black union members and others who were not to receive referrals. Instead, those favored (and white) union members received their job assignments through the back door. The Business Agents circumvented the information hall by awarding job assignments in the union hall's back room and over the telephone. One white member of Local 597, Ron Chopp, characterized the referral system as "a union within a union" (Tr. 1129). When Chopp was a "favored" union member, he received job referrals by calling the union hall directly, or by receiving unsolicited offers from the Business Agents who telephoned him (Tr. 1124). After Chopp fell out of favor due to a dispute between him and the union, he described one instance where he was present in the hall and told by the Business Agent on duty that there was no work available. In truth, however, another union member was called into the back room on the very same day, given a referral for himself and two of his companions, and told: "don't say anything to Choppy" (Tr. 1134).

The experiences of Daniels and other black union members were no better. The evidence showed that Local 597 had a long history of discriminatory treatment of blacks. Despite the Chicago Plan, whose avowed goal was to increase black membership in the union, the black membership in Local 597 remained constant or declined. Documents submitted by Local 597 to the EEOC showed that

in 1979 there were 7,561 members, 443 of whom were black. Seven years later, the overall figure increased slightly to 7,575, but the number of blacks had dwindled to 308 (Tr. 112-113).

Plaintiff also introduced the expert testimony of Professor Thomas DiPrete, an assistant professor in the Department of Sociology at the University of Chicago and a specialist in quantitative methodology and labor force dynamics. He compared the percentages of blacks and whites who were referred and concluded that black members of Local 597 received fewer job referrals than they should relative to their population in the referral hall. He pegged the statistical probability of this disparity occurring by chance at one in a trillion for 1981 and one in ten thousand for the years 1983 and 1984.

One of plaintiff's fellow union members, James Ferguson, testified that he complained to a union official about the racism present in the union as early as 1980. Specifically, Ferguson described one instance where, after being told by a Business Agent that mega-contractor Phillips and Getschow had no need to hire members of Local 597, he and six fellow members traveled directly to the construction site where they were hired on the spot.

Plaintiff testified that he was present at the information hall on several occasions when the discrimination in referrals essentially took place in plain view. While he stood around waiting for an assignment, he heard Business Agents giving out referrals over the telephone and observed favored union members going into the back room to receive referrals. On other occasions, the Business Agents went into the back room and picked names from a hat to determine who would receive a job assignment. Even when the Business Agents seemingly left things to chance, plaintiff stood by and watched others get all the referrals. There were even days when Daniels had to ask Business Agents to sign his unemployment card and state that there was no work available, when in fact the union records reveal that job assignments were in fact given. One

Business Agent, referring to Daniels' grievances against the union, said that he would not refer him: "Not that guy, I'm not going to refer him, he is trouble to the union; I would never refer him to a job" (Tr. 614). Other Business Agents told Daniels that they would not give him referrals.

In addition to withholding referrals from Daniels, Local 597 actively obstructed him from obtaining employment at the Zion, Illinois Nuclear Power Plant by refusing to submit a *pro forma* "good guy" letter of recommendation. Because he didn't have the letter, the employer required him to take the Minnesota Multiphasic Personality Inventory ("MMPI") psychological examination. Daniels viewed the test as a humiliation and Local 597's refusal to send the "good guy" letter as yet another attempt by the union to aggravate him.

In addition to being deprived of referral opportunities, plaintiff also was subjected to racial slurs. When he sought full union membership in the early 1970s, Daniels' superintendent told him that "they didn't permit niggers in the union and that if [he] persisted in trying to obtain a card in the union that [his] health would be in danger, as well as [his] family" (Tr. 1301). When he went to pick up his union card, he was told: "You nigger, get out of this fucking hall. We do not allow niggers on the premises. * * * [N]iggers don't hold cards in this union * * *. Nigger, I told you to get out of here" (Tr. 1302-1303).

B. *Plaintiff's Expulsion from Local 597*

Daniels was expelled from Local 597 on February 1, 1984, as a result of the internal disciplinary hearing held after he and one of the Business Agents, Frank LaBanca, got into a fight. The details of the fight are unclear, but it began because of a dispute over the volume of plaintiff's radio in the union hall. Apparently the fight did not get more physical than pushing and shoving, and neither plaintiff nor LaBanca was injured. After the altercation, LaBanca filed criminal charges against Daniels. Plaintiff,

on the other hand, attempted to file union disciplinary charges against LaBanca, but was prevented from doing so by union officials. Union officials permitted LaBanca to file internal disciplinary charges against Daniels, and the case was brought before the union at a membership meeting. Kenneth Lee, a Local 597 Vice-President and chair of the disciplinary committee, presided. When Daniels attempted to present his side of the story, Lee turned off the sound system, declared Daniels to be out of order, and adjourned the meeting. Subsequently, the executive board, which included Lee, considered LaBanca's charges against Daniels and concluded that Daniels was guilty beyond a reasonable doubt of playing his radio too loudly and of striking LaBanca. As a penalty, the executive board expelled plaintiff from Local 597 and fined him $5,000 (Tr. 1413; Plaintiff's Exhibits 10E, 10G). Local 597 referred the finding of guilt to the International Union, which affirmed Local 597's decision. LaBanca's criminal charges against Daniels did not proceed so successfully. A jury found Daniels not guilty (Tr. 1415-1416), but the union ignored this fact and when the International proceeded to uphold the Local's penalties (without having been informed of Daniels' acquittal in a court of law), Local 597 expelled Daniels.

II. ANALYSIS

A. *Plaintiff's Legal Claims*

1. Discrimination in referrals

Local 597 challenges its liability to plaintiff under 42 U.S.C. § 1981, claiming that the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, wrought a change in the law that invalidates the legal support for plaintiff's claim. This Court applies *Patterson* retroactively to cases that had not become final before the Supreme Court decided *Patterson*. *Mozee v. American Comm'l Marine Serv. Co.*, No. 90-2660, slip op. at 30, 1991 U.S. App. LEXIS 18498 (August 14, 1991); *Bailey v. Northern Indiana Pub. Serv. Co.*, 910 F.2d 406, 407 (1990);

McKnight v. General Motors Corp., 908 F.2d 104, 108-109 (1989), certiorari denied, 111 S. Ct. 1306. Before *Patterson*, § 1981 had been interpreted to prohibit a whole range of private discriminatory conduct on the basis of race, ethnicity, religion and other protected categories.

Although the language of § 1981 discusses the equal rights of all persons "to make and enforce contracts," the scope of a private actor's liability under § 1981 formerly arose in the context of a wide spectrum of relationships flowing from the creation of the contract. *Patterson* changed all this. The Supreme Court ordered reargument *sua sponte* on the question whether *Runyon v. McCrary*, 427 U.S. 160, the decision establishing the applicability of § 1981 to private conduct, should be overturned. 485 U.S. 617 (per curiam). Having heard oral argument in *Patterson* a second time to consider the continued viability of its twelve year-old decision in *Runyon*, the Court decided that § 1981 covered private acts of discrimination after all, but dramatically narrowed the statute's scope. Under *Patterson*, recovery under § 1981 is limited to discriminatory "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Patterson*, 491 U.S. at 179-180.

With *Patterson* on the books, black plaintiffs (and plaintiffs in other protected groups) can only use § 1981 to vindicate their civil rights when the acts of intentional discrimination prevent them from entering into contracts or from enforcing established contract rights. The enforcement prong of § 1981 liability gives rise to a narrow interpretation. Enforcement of contract rights does not mean enforcement of the right to be free from discrimination after the contractual relationship is entered into. On the contrary, impediments to enforcement arise only when blacks are prevented from enforcing rights that are specifically enumerated in the contract. To illustrate the point, an employer who impedes an employee's access to an internal grievance procedure, when the employee seeks to complain of his employer's failure to live up to its contractual obligation, has interfered with the enforcement

of a contract within the meaning of § 1981 post-*Patterson*. Alternatively, *Patterson* characterized racial harassment occurring after the formation of the contract as "reprehensible * * * if true" but not actionable under § 1981. *Id.* at 179. *Patterson* established the broad proposition that discriminatory post-formation conduct is not actionable under § 1981 and left it to the lower courts to determine precisely what type of conduct is properly characterized as discrimination in formation and enforcement, and what type of conduct is unactionable (under § 1981) post-formation conduct.[3]

Local 597 seizes on *Patterson*'s pronounced impact on the law and urges us to reverse the jury's verdict on the ground that § 1981 no longer provides a cause of action for Daniels. On appeal, defendant argues that the job referral service, however discriminatory it may be, is not actionable under § 1981 as discrimination in the making of a contract. First, defendant claims that the job referral service was nothing more than a mechanism to encourage union members to find employment with contractors. As a provider of "job leads," Local 597 asserts that its role cannot be characterized as facilitating the making of a contract. Alternatively, defendant contends that even if it impeded Daniels' efforts to enter into a contract, he was only prevented from entering into a contract *with others*. Obstructing someone's right to contract with others is, in the view of Local 597, unactionable under § 1981.

This interpretation of § 1981 shortens the reach of the statute and prevents the Reconstruction-era civil rights

---

[3] As we have stated before, in recognizing that *Patterson* left to the lower courts the task of spelling out the scope of § 1981's coverage:

> We show no disrespect to the Supreme Court * * *. The glory of the Anglo-American system of adjudication is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (1989).

remedy from being used to impose liability on intermediaries who erect insurmountable barriers to the formation of contracts. *Patterson* narrowed § 1981 by limiting the applicability of the statute to specific types of conduct; it did not bestow immunity on certain discriminatory actors. As the Supreme Court stated, "[§ 1981] prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Patterson*, 491 U.S. at 176-177.

By describing the referral service as a source of encouragement, Local 597 attempts to make the union hall sound more like the want ads section of a newspaper than like an indispensable step in a union member's effort to obtain a position. Local 597's job referral service was the primary mechanism through which contractors hired union employees pursuant to the Area Agreement. In any given year, Local 597 referred approximately one-third of its members to employers. As discussed above, the largest contractor relied exclusively on the referral system. In essence, no referral meant no job and no opportunity for union members to enter into employment contracts with employers. For blacks, the referral system was particularly critical, for the promise of non-discriminatory job referrals as guaranteed by the collective bargaining agreement meant that employers could not choose employees on the basis of race. An unbiased referral system would have assisted black union members in overcoming the racism they might have faced were they required to apply for positions on their own. Moreover, a referral system free of discrimination's taint would open additional doors of opportunity to blacks, who because of their historic exclusion from the industry, lacked the personal contacts to hear about job openings through other means.

Unfortunately for plaintiff, the referral system did not increase the availability of his job opportunities to overcome the entrenched discrimination in the industry, but instead was infected with discrimination so that the referral system erected substantial barriers to plaintiff's ability

to enter into contracts with employers. This kind of race-based impediment to contract formation constitutes exactly the sort of racially discriminatory interference with the right to contract that remains actionable under § 1981. To hold otherwise would impose a sort of § 1981 privity of contract requirement that would effectively protect third parties such as labor unions from § 1981 liability.

Local 597 argues that even if the referral system was discriminatory, § 1981 does not cover discriminatory interference with the right to contract with others. While it is true that the contract exists between the employer and the employee, and not between the employee and the union, this distinction does not insulate the union from § 1981 liability. Local 597 is not an unrelated third party whose interference with the contract bears an attenuated or haphazard connection to contracting between its members and the employer. On the contrary, Local 597 is the necessary intermediary and conduit connecting job opportunities to job referrals. By discriminating against the plaintiff through a refusal to refer him for jobs, Local 597 intentionally deprived Daniels of the ability to enter into contracts with employers, and this manner of discrimination falls squarely within the prohibition of § 1981. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (holding that "union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under * * * § 1981"); see, *e.g.*, *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391-392 (holding that intentionally discriminatory operation of union hiring hall did not permit imposition of vicarious § 1981 liability on the employer, where the employer, rather than the union, was named as a defendant). Such conduct was prohibited before *Patterson*, and the Supreme Court's decision in that case did nothing to change this.

We have demonstrated that Local 597's operation of its hiring hall discriminated against plaintiff because of his

race and prevented him from forging new contracts with employers through referrals. *Patterson* fixes our attention on contracts, and there is one more contract to consider in evaluating Daniels' § 1981 claim of discrimination in referrals. The collective bargaining agreement between Local 597 and Mechanical Contractors' Association is a contract containing an express non-discrimination clause that commits the union to refer its members on a non-discriminatory basis:

> nor shall there be any discrimination [with reference to opportunities for employment] * * * because of race, color, national origin, creed, or sex of the applicant. The Union will advise applicants for work about available jobs on a non-discriminatory basis * * *.

(Article X, Section 6 of Collective Bargaining Agreement at Plaintiff's Br. 26). Defendant's intentional discrimination in the operation of its information hall violates the letter of this non-discrimination clause. Whether Local 597's acts give rise to liability under § 1981 for discrimination in the enforcement of contract rights requires a closer inquiry into the scope of the statute as explained in *Patterson* and its progeny.

Patterson described actionable interference with the enforcement of contracts as "discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race." 491 U.S. at 177. However, consistent with *Runyon*'s rule that § 1981 covers discrimination by private actors, *Patterson* states unambiguously that *private* efforts to block the enforcement of rights established by contract violate the statute, and the decision makes specific reference to § 1981's coverage of labor unions:

> [§ 1981] also covers wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private en-

> tities, such as labor unions, in enforcing the terms of a contract.

Id. (emphasis in original).

This Court has distinguished those cases in which § 1981 permits an action to enforce non-discriminatory contracting from cases where a plaintiff may have recourse to federal anti-discrimination laws like Title VII but may not invoke § 1981. In *McKnight v. General Motors Corp.*, 908 F.2d 104 (1989), we explained that enforcement of established contract rights through the legal process is covered under § 1981 when the contract itself secures the right in question either expressly or by implication. *Id.* at 112. There we denied a claim for interference with the enforcement of a contract where the employment contract in question did not contain a promise by the employer not to discriminate, and state law did not create an implied term outlawing discrimination in every contract of employment. *Id.* In explaining why an action for enforcement did not lie, we distinguished the employment contract in *McKnight* from the one in *Goodman v. Lukens Steel Co.*, 482 U.S. at 656, where the Supreme Court upheld a § 1981 enforcement action, because "the collective bargaining contract contained an express clause binding both the employer and the Unions not to discriminate on racial grounds." *Id.* at 666.

Needless to say, the collective bargaining agreement in this case is more like the one in *Goodman v. Lukens Steel Co.* than the one in *McKnight*. By filing grievances, plaintiff made efforts throughout the limitations period of the § 1981 claim to enforce Local 597's express contractual obligation to provide all union members with an equal opportunity to obtain referrals regardless of race. As the record shows, Daniels' efforts were for naught, and his union consistently and intentionally withheld referrals from him on account of his race. Given that the non-discrimination clause was an express provision of the collective bargaining agreement, Local 597 was properly held liable as a matter of law for interference with the plaintiff's attempt to enforce contract rights.

2. Plaintiff's expulsion from Local 597

Local 597's interference with plaintiff's ability to enter into contracts with employers suffices to uphold the general verdict of liability under § 1981. However, the parties dispute whether *Patterson* and its progeny affect plaintiff's claim that his expulsion from the union stated a cause of action under § 1981.

Because the lower courts have attempted to define the extent to which *Patterson* preserves a cause of action for conduct extending beyond the formation of contracts, it is worth clarifying where expulsion from the union fits in the *Patterson* framework. We must decide whether plaintiff's expulsion is actionable with reference to the collective bargaining agreement, for it is this contract containing the non-discrimination clause that the plaintiff attempts to enforce. Plaintiff attempts to characterize the expulsion differently, arguing that it effectively impedes his ability to enter into contracts with prospective employers, because his expulsion prevents him from obtaining referrals. However true this might be as an empirical matter, it cannot be accepted as a basis for imposing § 1981 liability, for fear of making an end run around *Patterson*'s holding. To describe the expulsion as an impediment to referrals is to focus on conduct that occurred after the formation of the original contract—here the collective bargaining agreement. *Patterson* excludes from the coverage of § 1981 discriminatory conduct occurring after the contract is entered into. In *Patterson*, the post-formation conduct that was held not to be actionable was racial harassment. 491 U.S. at 179-180. Decisions interpreting *Patterson* have applied the same principle to exclude claims of discriminatory termination from the ambit of § 1981. *Baker v. Elmwood Distrib., Inc.*, No. 90-2466, slip op. at 5, 1991 U.S. App. LEXIS 18464 (7th Cir. August 13, 1991); *McKnight*, 908 F.2d at 108-109; *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991) (*en banc*), overruling *Hicks v. Brown Group, Inc.*, 902 F.2d

630, 635-638 (8th Cir. 1990); *Carroll v. General Accident Ins. Co.*, 891 F.2d 1174 (5th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805, 808 (5th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990). Without more, this particular justification for bringing expulsion within § 1981's ambit must fail. Post-formation discrimination will often have the effect of depriving an aggrieved party of opportunities to enter into new contracts. For example, an employee who is discharged has obviously lost the chance to be promoted to a higher position. The discriminatory failure to promote might in and of itself be actionable under § 1981 if it is a "new and distinct relation," *Patterson*, 491 U.S. at 185, but the fact that the employee didn't have the opportunity to be promoted does not make his termination actionable. Otherwise the prospective loss of an opportunity to contract could virtually always be invoked as a basis for applying § 1981 to post-formation conduct. *Patterson* makes clear that this hypothetical interference with contract formation fails to fall within the scope of § 1981.

Fortunately for Daniels, he did not rely solely on a post-formation theory in arguing that his expulsion violated the statute. He has characterized his expulsion as racially discriminatory retaliation. If § 1981 post-*Patterson* provides a remedy for plaintiff's expulsion, it does so because the expulsion is in retaliation for Daniels' efforts to bring Local 597 into compliance with the non-discrimination clause of the collective bargaining agreement. While we have recognized on at least four occasions that an action for retaliation under § 1981 potentially survives *Patterson*, *Mozee v. American Commercial Marine Serv. Co.*, No. 90-2660, slip op. at 31-32 (August 14, 1991); *Bailey v. Northern Indiana Pub. Serv. Co.*, 910 F.2d 406, 411 (1990); *McKnight*, 908 F.2d at 111-112; *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (1989), we have not yet actually held a defendant liable for retaliation. See also *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990) (recogniz-

ing that an employer's retaliatory conduct is actionable under § 1981 "when the employer aims to prevent or discourage an employee from using legal process to enforce a specific contract right"). In *Malhotra*, we first suggested that retaliation might be actionable, where the retaliation was racially motivated and interfered with a plaintiff's ability to make or enforce contracts on the same footing as white persons. 885 F.2d at 1313. However, we did not decide whether § 1981 covered the retaliation against plaintiff Malhotra, because his employer offered uncontested evidence that he was fired due to poor job performance. *Id.*

In *McKnight*, we took a more decisive stand, concluding that where the employer retaliates or threatens to retaliate in order to interfere with an employee's attempt to enforce a right established in a contract, the employer's action falls within the scope of § 1981, so long as the retaliation had a racial motivation. 908 F.2d at 111. However, we concluded that the plaintiff in *McKnight* failed to make out a retaliation claim, because the employment contract in question contained no contractual promise not to discriminate against him. To the extent that the retaliation was in response to plaintiff McKnight's complaints of discrimination, he asserted rights that were protected by federal anti-discrimination law, and not by the employment contract. *Id.* at 112.

Most recently, in *Mozee*, this Court restated the viability of a retaliation claim under § 1981 in cases where a plaintiff attempts to enforce rights guaranteed in the contract through the legal process or through some non-judicial method of adjudication. *Mozee*, No. 90-2660, slip op. at 32. However, the retaliation in that case was in response to the plaintiffs' participation in the "Black Days," a series of demonstrations protesting treatment of blacks at the defendant's plant. Despite its recognition that retaliation claims survived *Patterson*, the Court reversed the finding of retaliation in violation of § 1981, because there was no finding that the plaintiffs' participation in the Black Days

demonstrations represented their effort to enforce contract rights. *Mozee*, No. 90-2660, slip op. at 33.

Under the law of our Circuit since *Patterson*, for the retaliation to be actionable under § 1981, *McKnight* requires that the retaliation itself be racially motivated. 908 F.2d at 112. In other words, if a white union member filed grievances alleging racial discrimination against black members, and Local 597 retaliated in the same way by expelling him, then that retaliation against a white would not be racially motivated within the meaning of § 1981. The rule of *McKnight* in effect creates a double causation requirement in order for retaliation to be actionable under § 1981. First the plaintiff must show that the defendant interfered with his right to enforce the contract on account of race. Second, the plaintiff must then show that the retaliation itself had a racial motivation.

In his instructions to the jury, the district judge, through no fault of his own, read an instruction that fails to set forth the framework explained in *McKnight* in order for retaliation claims to survive. His instruction explained the law as it existed before *Patterson*, permitting the jury to impose liability where Local 597 retaliated against Daniels, simply because he filed charges:

> The plaintiff also claims that defendant violated Section 1981 of Title 42 of the United States Code by retaliating against him, because he filed race discrimination charges or because he participated in investigation, proceedings or hearing regarding such charges against the defendant.
>
> To prove this claim, *the plaintiff must prove, by a preponderance of the evidence, that the defendant expelled plaintiff from the union for filing these charges.*
>
> Plaintiff must prove that the defendant intentionally acted to retaliate against him.
>
> In order for the plaintiff to recover on his claim against the defendant, plaintiff must prove the following essential elements by a preponderance of the evi-

> dence: First, that the plaintiff was engaged in protective activities, that is, filed discrimination charges against the defendant, or participated in an investigation, proceedings or hearing regarding such charges; second, that the plaintiff was expelled from the union; and third, that there was a causal link between the protective activity and his expulsion from the union.

Jury Instruction No. 2 (Tr. 1939-1940) (emphasis added). Although Local 597 made no objection to the instruction at trial, it claims on appeal that the jury instruction misstates the law after *Patterson*.

Normally, Rule 51 of the Federal Rules of Civil Procedure requires that a party object to an instruction at trial if it wishes to preserve the issue for appeal. See Fed. R. Civ. P. 51. However, we have in the past recognized a narrow exception to this rule in situations "where an intervening Supreme Court case changes the law while appeal is pending. * * * This rule is a corollary to the general rule that an appellate court should apply the law as it exists at the time of appeal." *Brown v. M & M/Mars*, 883 F.2d 505, 512 (1989), citing *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152-1153 (7th Cir. 1978). While Local 597 is plainly wrong that the change in the law precludes all claims for retaliation under § 1981, *Patterson* and its progeny have made it more difficult for plaintiffs to bring a successful retaliation claim. As noted above, this Court's decision in *McKnight* recognized that the retaliation itself must be racially motivated. The jury instruction here does not require the jurors to make this additional finding in evaluating the retaliation claim. Thus if retaliation were the only basis on which the jury entered its verdict in favor of Daniels, we would remand the retaliation claim to the jury for reconsideration in light of the law as it has changed since *Patterson*. However, Local 597's discrimination in the formation of contracts with employers and discrimination in enforcement of the collective bargaining agreement provide independent bases for affirming the finding of liability under § 1981.

Although retaliation claims survive *Patterson*, we are required to join *Malhotra*, *McKnight*, and *Mozee* in stopping short of imposing liability for retaliation in this case. While the plaintiff has been led to the mountaintop, this Court cannot lead him into the promised land. Because we have recognized that retaliation is actionable but have stopped short of imposing liability, it is useful to illustrate the sort of showing required to bring a successful claim. If the jury were to be instructed according to the two-pronged inquiry mandated by *McKnight*, then it could find in Daniels' favor on the retaliation claim if it evaluated the evidence in the following manner. Daniels' expulsion followed an internal disciplinary hearing before the union's disciplinary board at which he was found "guilty beyond a reasonable doubt" of playing his radio too loudly and of striking LaBanca, one of the Business Agents responsible for depriving Daniels of referrals. While Local 597 believes that the fight and the subsequent finding of guilt provided it with a race-neutral reason for expelling Daniels, the plaintiff views events in a distinctly different light. He claimed at trial that the internal disciplinary process was infected with and motivated by racial discrimination, and that he would not have been expelled had he not attempted on many occasions to file grievances against Local 597 for its discrimination against him on account of his race.

From the plaintiff's perspective then, the altercation with LaBanca provided Local 597 with a pretext for expelling him from the union. In fact, throughout his membership in the union, plaintiff filed numerous complaints with the union and with federal and state agencies complaining of racial discrimination in referrals. After the fight, the executive committee allowed Business Agent LaBanca to file charges against Daniels, and then held a hearing at which Kenneth Lee, a union official who had made racist comments to plaintiff in the past, presided. Lee would not recuse himself from the hearing, and the hearing itself was plainly lopsided in favor of LaBanca.

The executive committee barred several of Daniels' witnesses from testifying, and in concluding that Daniels was "guilty beyond a reasonable doubt" of playing his radio too loudly and striking LaBanca, the tribunal claimed that Daniels presented no evidence in his defense. In fact, Daniels had attempted to show that the facts of the fight were not so clear as LaBanca painted them, and plaintiff wished to file his own internal grievance, but was not even permitted to do so. That the hearing was a pretext and a sham is borne out further by Daniels' acquittal by a criminal court jury for the very same charge. Even though a court of law acquitted him, the executive committee made no adjustment in his penalty—providing further evidence that the hearing was a device used by the union to force plaintiff out.

As to the racial motivation behind the retaliation itself, plaintiff would argue that the record is devoid of evidence that Local 597 retaliated against any white union member by expelling him. On the contrary, the evidence introduced by Daniels indicates that Daniels' race was foremost on the minds of the executive committee as it mounted his disciplinary hearing. Local 597 singled out Daniels, refused to allow him or any of his supporters to present plaintiff's side of the story concerning the fight, and finally expelled him when the pretext of the fight presented itself—all on account of Daniels' race. If the jury were instructed as to the proper legal standard and were to accept plaintiff's version of the facts, his retaliation claim would provide a viable alternative basis for upholding liability under § 1981. It would, of course, be up to the jurors to weigh the evidence presented by plaintiff and to determine whether it supported liability under § 1981 for retaliation.

3. Local 597's duty of fair representation

Local 597 next attacks the jury's verdict on Daniels' § 301 claim, arguing that § 301 of the Labor-Management Relations Act (29 U.S.C. § 185) does not support an action by a union member against his union. Section 301 provides for:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter * * * may be brought in any district court of the United States having jurisdiction of the parties * * *.

The statute not only imposes the responsibility for adhering to labor contracts on the employer, but also upon:

> (b) Any labor organization which represents employees in an industry affecting commerce * * *. Any such labor organization may * * * be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.

§ 301 (29 U.S.C. § 185). According to Local 597, a § 301 suit is an action in contract brought against an employer who has violated the terms of a collective bargaining agreement and does not apply to internal union matters such as the expulsion of a union member. In response, Daniels asserts that he properly brought his suit under § 301, since it provides a jurisdictional basis for his claim that Local 597 breached its duty of fair representation by discriminating against him because he is black. The confusion here arises as a result of the parties' respective understandings of the proper legal label for a suit brought by an employee against his union. Daniels' lawsuit is only a § 301 suit if the defendant breached its duty of fair representation under the terms of the collective bargaining agreement. If the claim does not arise out of the collective bargaining agreement, then the fair representation claim must rest on an alternative jurisdictional basis.

A brief summary of the development of the doctrine of the duty of fair representation bears repeating to dispel the parties' confusion about how the duty fits into the remedial scheme for redress of a union member's grievance against his union.[4] A union's duty to represent fair-

[4] For a comprehensive treatment of the duty of fair representation, see Martin H. Malin, Individual Rights Within the Union 348-493 (1988).

ly all employees attaches only when, as here, the union is the exclusive representative of employees in a collective bargaining unit. The duty is a judicially created creature of federal common law whose shape has been influenced most heavily by the Supreme Court. Initially, the duty took the form of a negative command against labor unions not to discriminate against their members on the basis of race. *Steele v. Louisville & N.R.R.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210. However, in the seminal case establishing the modern contours of the duty, *Vaca v. Sipes*, 386 U.S. 171, the Court recognized that the duty in its original form included "the statutory obligation to serve the interests of all members [of the collective bargaining unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. Additionally, the Court proceeded to elaborate upon the content of the duty, broadening its scope in the context of § 301 breach of contract actions. *Id.* at 187. *Vaca* inaugurated the duty as a general standard of union conduct for which a union would be in breach when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 191.

Since *Vaca*, suits for the breach of the duty of fair representation against the union and § 301 suits against an employer for violation of the collective bargaining agreement have proceeded alongside each other. These so-called hybrid suits, though formally distinct, are inextricably interdependent. *Olsen v. United Parcel Serv.*, 892 F.2d 1290, 1293 (7th Cir. 1990); *Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 914 (7th Cir. 1989). Indeed, *Vaca* recognized that courts, in order to entertain a § 301 suit against an employer, will first have to consider whether the union has breached its duty of fair representation. 386 U.S. at 187-188. The reason for this is plain. Most collective bargaining agreements include provisions for the arbitration of a union member's grievances against his employer and require the union member to pursue grievances

through the arbitral channels established in the agreement. When the union bound by an arbitration clause, however, refuses to process the member's grievance, and this failure is due to the union's intentional misconduct, *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 521 (7th Cir. 1981), then the union member has a cognizable claim for breach of the union's duty of fair representation. The aggrieved union member may then pursue both claims—the claim for breach of the duty of fair representation against the union, and a § 301 claim for breach of the employer's contractual obligations under the collective bargaining agreement. *Thomas*, 890 F.2d at 916-917.

Because the courts have required that union members bring hybrid suits if they wish to sue their employers under § 301, Local 597 apparently thinks that the obligation to bring a hybrid fair-representation suit runs in both directions. This is simply not the case. In *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, the Supreme Court held that an employee who alleged that his union breached its duty of fair representation in intentionally failing to refer him for jobs through the union hiring hall did not have to sue the employer under § 301 in order to press his claim against the union. 493 U.S. at 80-83. The Court explained that a suit against the employer is not a prerequisite to a suit against the union:

> While in *Vaca* an allegation that the union had breached its duty of fair representation was a necessary component of the § 301 claim against the employer, the converse is not true here: a suit against the union need not be accompanied by an allegation that an employer breached the contract, since whatever the employer's liability, the employee would still retain a [fair representation] claim against the union.

Id. at 82-83. Where the union has thus assumed contractual duties to its employees through a collective bargaining agreement, § 301 provides a jurisdictional basis for the fair representation claim against the union.

In *Lewis v. Local Union No. 100 of Laborers' Int'l Union*, 750 F.2d 1368 (7th Cir. 1984), decided before *Breininger*, we held that an employee may bring a claim for breach of the duty of fair representation even when it is not accompanied by a § 301 suit against the employer. *Id.* at 1376-1377. We also recognized that 28 U.S.C. § 1337, which establishes district court jurisdiction over suits arising under statutes regulating interstate commerce, provides an independent jurisdictional basis for a "bare" fair representation claim against the union even where the employee fails to allege breach of contract by the union under the terms of the collective bargaining agreement. *Id.* at 1375 n.7; *Breininger*, 493 U.S. at 83 ("We have always assumed that independent federal jurisdiction exists over fair representation claims because the duty is implied from the grant of exclusive representation status, and the claims therefore 'arise under' the [National Labor Relations Act]"). Despite this recognition, in *Lewis* we found that § 301 provided a jurisdictional basis for the employee's claim that the union discriminated against him in failing to refer him through the union hiring hall, because the collective bargaining agreement established the union's exclusive right to refer employees.

For plaintiff to call his claim a § 301 suit is therefore not exactly a misnomer, but Daniels has not been as precise as he could have or should have been. Section 301 provided the jurisdictional basis for the suit alleging a breach by Local 597 of its duty of fair representation. Plaintiff uses § 301 and the duty of fair representation interchangeably, when the former provides jurisdictional support to the latter and his suit against Local 597 is properly called a fair representation suit. Although 28 U.S.C. § 1337 provides a jurisdictional basis for a "bare" fair representation suit against Local 597, as we make clear in our above discussion of Local 597's liability under § 1981, the collective bargaining agreement imposes a contractual obligation on Local 597 not to discriminate either in job referrals or in the processing of a union member's grievances. Therefore, the contractual obligation imposes a concomitant duty of fair

representation on the union. See *International Brotherhood of Elec. Workers v. Hechler*, 481 U.S. 851, 860 (recognizing that a labor union "may assume a responsibility towards employees by accepting a duty of care through a contractual agreement").

Although Daniels' complaint may not have been a model of artful pleading, Local 597 does not claim on appeal that the complaint should have been dismissed, and we construe the allegations of a complaint liberally. *Conley v. Gibson*, 355 U.S. 41, 47; *Lewis*, 750 F.2d at 1373. It is irrefutable that the allegations of plaintiff's suit claimed a violation of Local 597's duty of fair representation, and that the jury found Local 597 to be in breach of this duty. In *Breininger*, the Supreme Court recognized that discriminatory operation of a union hiring hall states a claim for breach of the duty of fair representation. 493 U.S. at 75. We have recognized previously that intentional discrimination by a union in the operation and administration of a job referral system violates the union's duty of fair representation. *NLRB v. Local 139, Int'l Union of Operating Eng'rs*, 796 F.2d 985, 992-993 (7th Cir. 1986).[5] There is no need to revisit the evidence that Local 597 violated its duty of fair representation to plaintiff. The record is rife with evidence that the union intentionally discriminated in the operation of its referral system and intentionally ignored his many grievances. Therefore the jury acted reasonably and well within its discretion in finding that Local 597 violated its duty of fair representation.

[5] Because Daniels stated a valid claim against Local 597 for violation of its duty of fair representation, we need not linger over defendant's claim that a new trial should be ordered because two of the district court's jury instructions were in error. Daniels' expulsion and the failure by the union to process plaintiff's grievances both gave rise to a cognizable claim that Local 597 breached its duty of fair representation. Therefore, the jury instructions below did not prejudice defendant.

Local 597 argues finally that even if Daniels asserted a cognizable claim that it breached its duty of fair representation pursuant to § 301, plaintiff's claim is barred by the six-month statute of limitations applicable to such suits. Plaintiff correctly accepts that the six-month statute of limitations applies. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 155 (deriving six-month statute of limitations from § 10(b) of National Labor Relations Act and applying it to hybrid § 301/fair representation claims). The disagreement arises over when the limitations period begins to run. Local 597 argues that the limitations period is tolled by the date plaintiff was first expelled from the union—September 6, 1983. Daniels did not file his claim until June 20, 1984, more than six months later. Plaintiff responds that the relevant accrual date is February 1, 1984, the date on which plaintiff's request for review to the International Union was denied and his expulsion was upheld.

Daniels' claim was timely under our previous decisions, for the limitations period did not commence until February 1, 1984, the date that he had exhausted his internal appeals within the union. As this Court has recognized previously, "a section 301/fair representation claim usually accrues from the time a final decision on a plaintiff's grievance has been made or from the time the plaintiff discovers * * * that no further action would be taken on his grievance." *Martin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239, 1246 (1990), quoting *Richards v. Local 134, Int'l Brotherhood of Elec. Workers*, 790 F.2d 633, 636 (7th Cir. 1986); *Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks*, 782 F.2d 674, 681 (7th Cir. 1986) (six-month statute of limitations commences to run only when union procedures are exhausted, even when the internal grievance procedure proves to be futile). Our recognition that the limitations period does not begin to run until internal union appeals are exhausted makes eminent sense. A rule that starts the clock ticking earlier would present a substantial disincentive to union members to pursue internal remedies, a result that would be entirely

inconsistent with national labor policy. See *Frandsen*, 782 F.2d at 681. Moreover, it would frustrate the Supreme Court's purpose in *DelCostello* of granting the union member a six-month period in which to file his claim in order to ensure that he has enough time to retain counsel and evaluate the adequacy of the union's representation. *Id.* at 682.

4. Plaintiff's Title VII claim

As to the district judge's determination that the discrimination by Local 597 against Daniels violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2), the union argues for reversal because the judge did not make independent findings of fact, relying instead on the jury's verdict on the § 1981 and fair representation claims. In urging this position, the defendant by its own admission invites us to revisit our prior holding that a jury's verdict, when § 1981 and Title VII claims are tried simultaneously, binds the judge on factual issues common to both claims. *McKnight*, 908 F.2d at 113; *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1293-1294 (1987); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1421 (1986); see also *Wade v. Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988); *Lincoln v. Board of Regents*, 697 F.2d 928, 934 (11th Cir. 1983), certiorari denied, 464 U.S. 826. This rule is well settled, and we decline to disturb it here. Moreover, even where we concluded in *McKnight* that a plaintiff's successful § 1981 claim must be reversed because of *Patterson*, the Court held that the jury's factfinding on issues common to the jury and to judge-tried claims is dispositive. *McKnight*, 908 F.2d at 112-113. As further justification for the continued application of this rule, we recognized that a remand would serve no purpose, for it would add nothing to the comprehensive record already before the appellate court. *Id.* at 113, citing *Mallory v. Citizens Utils. Co.*, 342 F.2d 796 (2d Cir. 1965).

This case is even clearer than *McKnight*, for the jury's verdict on the § 1981 claim survives *Patterson* (although

the rationale is now more precise) and its verdict on the fair representation claim remains entirely undisturbed. Therefore, the jury's findings concerning Local 597's intentional discrimination against plaintiff provide a basis for the equitable relief awarded to him by the district judge under Title VII.[6]

Local 597 also challenges the evidentiary basis for the district judge's conclusion that the union violated Title VII due to the disparate impact of its hiring practices on blacks. To make out a *prima facie* case of discrimination under a theory of disparate impact, a plaintiff must identify the specific employment practice that is challenged. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994. Then plaintiff must offer statistical evidence to show that the employment practice in question caused the exclusion of individuals on account of membership in a protected group. *Id.* In the leading case establishing a theory of disparate impact as a basis of recovery under Title VII, *Griggs v. Duke Power*, 401 U.S. 424, the Supreme Court found a violation where "requirements operate to disqualify Negroes at a substantially higher rate than white applicants." *Id.* at 426.

Although the district court adopted the jury's findings of fact, it made additional findings of its own sufficient to support liability under a theory of disparate impact. The court credited the testimony of the statistical expert,

---

[6] Local 597 makes an additional attempt to sever the connections between the jury verdict and the Title VII claim by asserting that the Title VII 300-day statute of limitations excluded from the district court's consideration discriminatory incidents occurring in 1981 and 1982, several years before plaintiff filed his lawsuit. A litigant's objection to the statute of limitations is an affirmative defense that must be raised in order to be preserved. See *McMahon v. Eli Lilly & Co.*, 774 F.2d 830, 836-837 (7th Cir. 1985). Here Local 597 waived any objection to the period covered by Title VII, for it did not object when the plaintiff proposed and the district court found that the statute covered claims after October 8, 1980 (Pleading Vol. 2, No. 138).

Thomas DiPrete of the University of Chicago, who testified on plaintiff's behalf. He examined the disparity in the rate of referrals and arrived at figures for the years covered by the Title VII suit. In 1981, two-thirds of the referrals went to whites, while one-third of the referrals went to blacks. In 1983, the disparity increased, so that blacks received only fifteen percent of the referrals. And in 1984, blacks received only fourteen percent of the referrals, despite the fact that thirty to fifty percent of the Local 597 members present at the hall were black.[7] DiPrete concluded that the probability that this disparity in referrals would arise by chance was less than one in a trillion for the year 1981. As the Supreme Court has recognized, it takes only five percent or less probability that the disparity results from chance to state a disparate impact claim under Title VII. *Castaneda v. Partida*, 430 U.S. 482, 496-497 n.17; see also *Mozee*, No. 90-2660, slip op. at 12 n.7; *Mister v. Illinois C.G.R.R.*, 832 F.2d 1427, 1437 (7th Cir. 1987), certiorari denied, 485 U.S. 1035; *Coates v. Johnson & Johnson*, 756 F.2d 524, 537 n.11 (7th Cir. 1985).

Contrary to the suggestion by Local 597, the district court explicitly reviewed DiPrete's conclusions as to the statistical disparities in referrals and found his testimony to be "concise, very credible and uncontroverted" (R. 203 at 6-7). In the view of the district court, Daniels made out a *prima facie* case of disparate impact discrimination under Title VII. Because Local 597 argues that the district court failed to make findings of fact at all, the union does not claim that the district court's findings were in error. However, even were we to review the findings, the scope of our review would be limited, for we may overturn only those findings that appear to be clearly erroneous. *Mozee*, 90-2660, slip op. at 14; *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988).

---

[7] The district court did not include figures for 1982, because DiPrete did not analyze the figures for that year due to a "typographical error" in the summaries prepared by plaintiff's counsel.

In addition to the district judge's findings as to plaintiff's disparate impact theory, the district court also made findings sufficient to sustain Daniels' claim of racial harassment due to a hostile work environment under Title VII. In *Patterson*, the Supreme Court held that racial harassment is not covered by § 1981, but the Court reaffirmed its prior holding in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66, that "such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964." *Patterson*, 491 U.S. at 180. This Court has also recognized that Title VII provides a basis for an independent claim of racial harassment. *E.g., Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1270 (7th Cir. 1991); *Malhotra*, 885 F.2d at 1308; *Nazaire v. Trans World Airlines, Inc.*, 807 F.2d 1372, 1380 (1986), certiorari denied, 481 U.S. 1039; *Hunter v. Allis-Chalmers*, 797 F.2d at 1420.

When the district judge properly applies the correct legal standards for finding racial harassment due to a hostile work environment (there is no indication that he failed to do so here), the clear error rule must be applied to his findings. *Daniels v. Essex Group*, 937 F.2d at 1269; *Starks v. George Court Co., Inc.*, 937 F.2d 311, 315 (7th Cir. 1991). But since Local 597 claims that the district court made no findings at all, it has essentially forfeited any argument that the findings made at the Title VII bench trial were clearly erroneous. Here the district judge found in no uncertain terms that Daniels was subjected to discrimination by the Business Agents responsible for referrals. Judge Alesia credited the testimony of Daniels' fellow union members, James Ferguson, Frank Craddieth and Ronald Chopp (R. 103 at 7). Therefore, the evidence sufficed to sustain Daniels' claim of racial harassment under Title VII.

B. *Plaintiff's Cross-Appeal*

Daniels cross-appealed asking this Court to award him prejudgment interest and pension credits. This Court has

stated previously that, as a general matter, prejudgment interest is "presumptively available to victims of federal law violations." *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (1989). In cases involving violations of the federal civil rights laws, prejudgment interest is available as a matter of course on an award of backpay, *Williamson v. Handy Button*, 817 F.2d at 1297, so long as this amount is "readily determinable." *Id.* at 1298.

Here the jury returned a general verdict that awarded $181,063.50 in compensatory damages. Some portion of this award comprised backpay, while the rest compensated Daniels for his emotional distress. We suggested in *Williamson v. Handy Button*, that where the district judge determines that it was too hard to figure out what the jury awarded as backpay, a civil rights plaintiff may not be entitled to prejudgment interest. 817 F.2d at 1299. Because the jury awarded a general verdict in Daniels' favor, the district judge had no way of reading the minds of the deliberating jurors to determine how they arrived at the final, comprehensive amount. As the district judge noted, the award of compensatory damages for emotional distress is highly subjective, and the jurors may well have rested the lion's share of its award on this aspect of the injury. See *Hunter v. Allis-Chalmers*, 797 F.2d at 1425.

Plaintiff attempts to convince us that the amount of backpay is readily ascertainable, by presenting his own calculation of wage loss, which incidentally is slightly less than the amount originally claimed by plaintiff—$109,000. However, it was within the province of the jury to determine the amount of compensatory damages and to include the amount of backpay it believed was due to plaintiff in its award. Moreover, a district judge's decision to deny an award of prejudgment interest is reviewed according to an abuse of discretion standard. *E.E.O.C. v. Gurnee Inn Corp.*, 914 F.2d 815, 820 (7th Cir. 1990); *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 411 (7th Cir. 1989), affirmed, 494 U.S. 820. By denying Daniels prejudgment

interest, we do not mean to suggest that the amount of backpay must be determined down to the last penny. On the contrary, we have previously recognized that it is virtually impossible to determine the amount of backpay with absolute certainty. *Williamson v. Handy Button*, 817 F.2d at 1299. Nevertheless, when a plaintiff presents a district judge with a claim for prejudgment interest, he must have some basis on which to conclude that backpay accounts for some minimum amount of the compensatory damage award. Because the district judge has no means to parse the elements of the general verdict, prejudgment interest must be denied.

Since Daniels failed to produce evidence that he was entitled to any other benefits besides wages, the district court denied him damages for lost pension benefits. Plaintiff claims on cross-appeal that the district judge should have awarded pension credits because the collective bargaining agreement provided that employers are to contribute to the pension fund for each straight time hour worked by hourly employees. (Article III, Section 3 of Area Collective Bargaining Agreement at Plaintiff's Br. App. 16). Because the district court found that plaintiff worked 2100 hours per year, Daniels argued that he should have been awarded a corresponding amount of pension credits. Despite the fact that plaintiff worked for 2100 hours, the Agreement simply states that an appropriate amount of pension benefits will be "determined from time to time through negotiations." (*Id.*). It provides no mechanism for calculating this amount, and the plaintiff produced no evidence to substantiate his claim. Therefore, the district judge did not abuse his discretion in denying Daniels' claim to pension credits.

III. CONCLUSION

As this Court's analysis makes clear, Daniels has "successfully negotiate[d] the shifting shoals of present-day federal employment discrimination law." *Malhotra*, 885 F.2d at 1313. He had help, however, from Local 597, whose

Business Agents made plaintiff the brunt of its intentionally discriminatory practices. Faced with a substantial jury verdict against it in the amount of $331,000, Local 597 seeks to transform § 1981 from a sword into a shield, claiming that the Supreme Court's decision in *Patterson* protected the union from liability to Daniels. However, as concluded above, Daniels' case did not disintegrate with *Patterson*, for he alleged discriminatory conduct by Local 597 that fell squarely within the admittedly shorter reach of § 1981. That § 1981 post-*Patterson* no longer covers discriminatory conduct after the formation of a contract does not mean that § 1981 is a toothless remedy. When the discriminatory conduct interferes with the making and enforcement of contracts as in this case, § 1981 still has plenty of bite. Therefore, the jury's verdict as to plaintiff's § 1981 claim (in light of our explanation of the law after *Patterson*) and as to plaintiff's fair representation claim must be affirmed. Accordingly, the jury's award of $181,063.50 in compensatory damages and $150,000.00 in punitive damages will remain undisturbed, as will the district court's award of attorneys' fees and costs.

JUDGMENT AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: September 30, 1991

BEFORE:

Honorable Walter J. Cummings, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable James E. Noland, Senior District Judge*

Nos. 90-3124 and 90-3261

FRANK DANIELS,
Plaintiff-Appellee, Cross-Appellant,

v.

PIPEFITTERS' ASSOCIATION
LOCAL UNION NO. 597,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 5224—James H. Alesia, Judge.

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

---

* The Honorable James E. Noland, Senior District Judge for the Southern District of Indiana, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 30, 1991.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. James E. Noland, Senior District Judge*

Nos. 90-3124 and 90-3261

FRANK DANIELS, *Plaintiff-Appellee, Cross-Appellant,*

v.

PIPEFITTERS' ASSOCIATION
LOCAL UNION NO. 597,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 5224—James H. Alesia, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by defendant-appellant on October 15, 1991, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable James E. Noland, Senior District Judge for the Southern District of Indiana, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 5224

FRANK DANIELS,

Plaintiff,

v.

PIPEFITTERS' ASSOCIATION
LOCAL UNION NO. 597,

Defendant.

MEMORANDUM OPINION AND ORDER

Now before the Court are the defendant's post-trial motions, the Court's decision, findings of fact and conclusions of law with respect to the plaintiff Frank Daniels' ("Daniels") Title VII claim and the plaintiff's petition for attorneys' fees and costs. Daniels seeks legal and equitable relief in this action for alleged violations of his rights pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(c)-(d) ("Title VII"), the Civil Rights Act of 1866, 42 U.S.C. section 1981 ("section 1981"), and the Labor-Management Relations Act, 29 U.S.C. Section 185 *et seq.* ("section 301" or "duty of fair representation"). The section 1981 and section 301 claims were tried before a jury, which returned a general verdict in favor of Daniels and awarded compensatory damages in the amount of $181,063.50 and punitive damages in the amount of $150,000.00. The Court simultaneously heard plaintiff's Title VII claim and now finds in favor of the plaintiff, denied Local 597's post-trial motions, and awards the plaintiff attorneys' fees and costs, as is more fully explained below.

I. FINDINGS OF FACT

The Court is not required to make findings of fact pursuant to Federal Rule of Civil Procedure 52 where it hears a Title VII claim simultaneously with the jury's consideration of a section 1981 claim, because the jury necessarily determines the factual issues raised by the Title VII claim. *McKnight v. General Motors Corporation*, No. 89-1379 (7th Cir. July 2, 1990). In this instance, however, the Court sets forth its abbreviated findings of fact because of the unsettled nature of the viability of certain section 1981 claims following *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989), and because those findings indirectly address the defendant's arguments that the evidence was insufficient to support certain aspects of the jury's verdict, as well as provide some factual background for the legal issues which the Court must address.

The allegations of the Complaint and the evidence presented at trial related to, among other things, the operation of what the Court will refer to as the Pipefitters' Association Local Union 597 ("Local 597") "information hall", for lack of a better term. The information hall is operated by the union through its business representatives. Members of the union may receive referrals for employment through the information hall. The information hall is not an exclusive hiring hall, but rather is a service offered by the union to its members pursuant to the collective bargaining agreement. Daniels, a black man, contended that the information hall was operated in a racially, discriminatory manner. Daniels also argued that Local 597 retaliated against him for his complaints of racial discrimination, by filing internal, disciplinary proceedings against him which led to Daniels' expulsion from the union.

1. Plaintiff Frank Daniels is a black male and citizen of the United States. Daniels was a member of Local 597 from 1974 until 1984, when he was expelled by the union following a hearing on charges brought against Daniels by union business representative Frank LaBanca, arising out of an altercation between Daniels and LaBanca at the information hall in 1983.

2. On October 13, 1983, Daniels filed Complaint No. 051840434 with the Equal Employment Opportunity Commission ("EEOC") charging Local 597 with racial discrimination and retaliation in refusing to provide Daniels with an authorization letter attesting to his trustworthiness in connection with a job referral to Hunter Corporation for work at the Zion, Illinois nuclear power plant in order to exempt Daniels from taking a psychological test. A right-to-sue letter was issued on March 23, 1984.

3. On May 11, 1983, Daniels filed Complaint No. 051833849 with the EEOC charging Local 597 with racial discrimination and retaliation in failing to refer Daniels for available employment. A right-so-sue letter was issued on March 23, 1984.

4. On June 20, 1983, Daniels filed Complaint No. 51894227 with the EEOC charging Local 597 with systemic racial discrimination in the conduct of union affairs, including its job referral system. A right-to-sue letter was issued on March 23, 1984.

5. Local 597, is a labor union representing pipefitters and welders engaged primarily in the building trades. Local 597's territorial jurisdiction encompasses northern Illinois and northern Indiana. Local 597 is a labor organization within the meaning of 42 U.S.C. § 2000 (d) and (e) and within the meaning of the Labor Management Relations Act, 29 U.S.C. 185, *et seq.* The parent body of Local

597 is the United Association of Journeymen, Apprentices of the Plumbing and Pipefitters Industry of the United States and Canada.

6. At all times relevant to this action, Local 597 was a party to a collective bargaining agreement ("labor agreement") entered into with the Mechanical Contractors Association.

7. Article X, Section 1 of the labor agreement provides that employers have the sole and exclusive responsibility for hiring. Section 2 accords the union discretion to refer prospective employees to an employer. Article X, Section 3 of the labor agreement provides as follows:

(a) The employer shall notify the union of opportunities of employment.

(b) The union shall have an opportunity to direct qualified applicants for such employment.

(c) Priorities in opportunities for employment may be given, based upon length of service with such employer in the industry or in the particular geographic area or to an employee possessing special skills.

Section 5 provides, in part, that the union will advise applicants of work on a non-discriminatory basis, without regard to the applicant's race or color. Section 6 provides that the employer has the sole and exclusive right to reject applicants.

8. Both plaintiff and defendant introduced limited background evidence relating to Local 597's racial history and practices. In December 1973, the United States Department of Labor ("DOL") promulgated the Chicago Plan. After public hearings regarding minority membership in building trades unions and employment, the DOL found that minorities were substantially under-represented in the

industry, including pipefitting. The purpose of the Chicago Plan was to improve the representation of minorities in the building trades. Daniels and many of the black pipefitters who testified during the trial entered the building trades as a result of the Chicago Plan.

9. In 1973, the United States of America filed suit against Local 597 and other building trade unions and construction contractors alleging *inter alia* that Local 597 maintained a referral system which informs fitters and welders of a "substantial portion of all employment opportunities". *U.S.A. v. Int'l Assc. of Heat and Frost Insulators, et al.*, Case No. 73 C 2020 (N.D.Ill. 1973).

10. Local 597 entered into a Consent Decree on August 9, 1973 in Case No. 73 C 2020. In entering into the Decree, Local 597 did not admit to any liability, nor did the Court make any findings as to whether the union engaged in intentional discrimination on the basis of race. The Decree provided *inter alia*, that Local 597 would refrain from employment practices or acts which had the purpose or effect of discriminating on the basis of race and that the union would engage in good faith affirmative action efforts.

11. The official reports filed by the defendant with the Equal Employment Opportunity Commission demonstrate that Local 597's racial composition was as follows:

Year Ending	Total Union Members	#Black Members	Total % Black Members
1980	7155	443	6.1%
1981	9527	338	3.5%
1982	7882	300	3.8%
1983	7610	303	3.8%
1984	5687	210	3.7%

12. Plaintiff filed numerous charges and complaints against Local 597 and construction contractors between 1974 and 1984. In the mid-1970's, as part of his opposi-

tion to the union's racial policies, Daniels paid his dues "under protest". Union Agent Enright testified that no other union member ever paid his dues under protest.

13. Between 1979 and 1984 Daniels was qualified under union rules as a pipefitter and welder. Daniels presented credible evidence that he performed pipefitting and welding work competently during the same period. Also, during that period, work was available through Local 597's referral hall, but Daniels and other blacks were not referred for that work at the same rate or frequency as whites. The black members of Local 597 received proportionately fewer referrals.

14. Thomas DiPrete, the only expert witness who testified, was called on behalf of the plaintiff. DiPrete testified that he did a statistical analysis of the dispatch and manpower records of Local 597 in order to determine if there was any difference in the rate of referrals between black members and white members for the years 1981 through 1984. DiPrete did not personally examine the dispatch and manpower records, but rather relied on summaries furnished by plaintiff's counsel.

15. DiPrete based his conclusions on certain assumptions furnished by plaintiff's counsel. The assumptions were that on the average day, there were between 20 to 30 members in the hall and that 30% to 50% of the members present in the hall were black. Those factual existence of those assumptions during the relevant period were supported by the testimony of several of plaintiff's witnesses.

16. During the year 1981, one-third of the referrals went to black members and two-thirds went to white members. During the year 1983, the rate of black referrals was 15% and for the year 1984, the rate of black refer-

rals was 14%. DiPrete did not do an analysis of the 1982 referrals because of a "typographical error" in the summaries prepared by plaintiff's counsel.

17. DiPrete concluded that for each year analyzed, the proportionate number of blacks referred was so much less than the proportionate number of blacks present in the hall, that it was extremely unlikely that those figures were caused by chance alone. For example, in the year 1981, the likelihood that the percentage of black members referred was the result of chance was less than one in a trillion. DiPrete testimony was concise, very credible and uncontroverted.

18. Daniels also presented credible evidence of racial slurs and race-related threats made by various Local 597 business agents through the testimony of union members James Ferguson, Frank Craddieth and Ronald Chopp.

19. Daniels presented credible evidence that the average hours worked per year by a pipefitter in the Chicago area were 2100 hours per year.

20. In 1980, Daniels worked 1023 hours and the wage scale was $17.00 per hour. In 1981, Daniels worked 1322 hours and the wage scale was $17.00 per hour. In 1982, Daniels worked 1244.50 hours and the wage scale was $18.00 per hour. In 1983, Daniels worked 193.50 hours and the wage scale was also $18.00 per hour. In 1984, Daniels did not work at all as a union pipefitter and the wage scale was at least $18.00. Daniels obtained employment in April of 1984 with the United States Department of the Navy as a welder. Daniels was paid at the rate of $10.15 per hour by the Navy.

21. Plaintiff's counsel requested that the jury award $109,000.00 in backpay, $100,000.00 in damages for emotional distress and $100,000.00 in punitive damages.

II. CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

2. Venue properly lies in this district pursuant to 28 U.S.C. § 1391(b).

3. This action is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

4. The same standards govern liability for claims alleging intentional discrimination under both Title VII and section 1981. *Freidel v. City of Madison*, 832 F.2d 965, 971 (7th Cir. 1971). The jury's determination as to Local 597's liability under section 1981 binds this Court with respect to the factual issues common to the Title VII and section 1981 claims. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986).

5. The jury's verdict as to the section 1981 claim requires the conclusion that the jury determined that Daniels was a black person; that he was qualified for the position of welder; that Daniels was not referred to work by Local 597 or that Local 597 caused employers to either refuse to hire Daniels or to fire Daniels; that comparably-qualified white persons were referred by Local 597 and Local 597 did not cause employers to either refuse to hire or to fire those white persons; and that Local 597 acted with a racially discriminatory purpose.

6. Daniels' *prima facie* case with respect to the Title VII claim is virtually identical to his *prima facie* case, set forth above, with respect to the section 1981 claim. Accordingly, Daniels met his burden with respect to his Title VII claim as well.

7. Once the plaintiff establishes a *prima facie* case of race discrimination, then the defendant must produce evi-

dence of a lawful reason for the adverse action that the plaintiff suffered. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The jury rejected Local 597's proffered non-discriminatory reasons for Daniels' receipt of fewer referrals than his white counterparts, including Local 597's attempt to establish that Daniels was not qualified. Therefore, Daniels met his burden with respect to any non-discriminatory justification, which is also an issue as to his Title VII claim.

8. Therefore, this Court finds, as a matter of law, that Local 597 discriminated against Daniels on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Daniels' proof of discrimination included not only disparate impact, statistical analysis, but also evidence of intentional, racial discrimination.

9. The jury awarded Daniels compensatory damages in the amount of $181,063.50. Those damages include compensation for both Daniels' section 1981 and section 301 claims. The jury was instructed that it could only award damages for the period of time October 7, 1980 until June 20, 1985 as to Daniels' section 1981 claim. The jury was instructed that it could only award damages to Daniels for the period of December 20, 1983 until June 20, 1984 with respect to his section 301 claim. Those periods of time were derived from the respective statutes of limitation.

10. Daniels is entitled to reinstatement of his union membership retroactive to the date of his expulsion. Daniels is not entitled to an equitable award of backpay with respect to his Title VII claim, as the jury awarded Daniels backpay for the period of 1980 through 1985, a period which included the relevant period of time the Court considered with respect to Daniels' Title VII claim.

11. Daniels is not entitled to other benefits, such as pension or health benefits, as he did not present any evidence of other benefits which he might claim.

12. The Court finds that injunctive relief is appropriate with respect to the operation of the Local 597 information hall to ensure that the hall is not operated in a racially, discriminatory manner in the future. Accordingly, the Court will appoint a special master to consider the appropriate system of referring members of Local 597 to available jobs and the implementation of that system. The Court also finds, however, that there exists no just reason for delay of appeal of those matters as to which the Court enters final judgment pursuant to Federal Rule of Civil Procedure 54(b). F.R.Civ.P. 54(b).

III. LOCAL 597'S POST-TRIAL MOTIONS

Local 597's arguments with respect to its motion for judgment notwithstanding the verdict are primarily that there was not sufficient evidence for the jury to decide various contested issues of fact in favor of Daniels.[1] Because the Court is bound as to the Title VII claim by many of the jury's factual findings to which the defendant now objects in its motion for judgment notwithstanding the verdict, and because there was sufficient evidence in the record to support those findings, Local 597's motion is denied. This discussion will address the defendant's motion for a new trial only. The defendant's motion for a new trial sets for several grounds for relief, as does the defendant's memorandum in support of the motion. Unfortunately, the motion and the memorandum do not address all of the same issues, with the result that the Court has the benefit of the defendant's legal analysis as to only some of the issues raised. Moreover, the defendant incorporated by reference its grounds for relief set

forth in the motion for judgment notwithstanding the verdict into its motion for a new trial. The Court's ruling with respect to those grounds realleged in the motion for a new trial is the same as the Court's ruling with respect to the motion for judgment notwithstanding the verdict generally, the Court rejects the defendant's argument that those grounds merit relief. Finally, the Court denies the defendant's motion for a new trial, insofar as it raises the same issues ruled upon during the course of the trial, or their cumulative effect. Therefore, only the remaining arguments raised in the defendant's motion for a new trial and the timeliness of the section 301 claim are addressed below.

A. *Section 301*

The defendant's motion for judgment notwithstanding the verdict raises the issue of whether the plaintiff's section 301 claim is time-barred. The applicable statute of limitation for breach of the duty of fair representation is six months and is borrowed from Section 10(b) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 160(b); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). Daniels argues his claim was timely-filed because the International's review of Local 597's June 21, 1983 hearing and subsequent decision to expel Daniels was not final until February of 1984, within the six-month period preceding the June 20, 1984 filing date of this lawsuit. (Tr. 1774) Thus, the plaintiff argues that the International's review served to toll the statute of limitation as to the underlying acts complained of in the lawsuit, i.e. the allegedly arbitrary, capricious and discriminatory hearing held by Local 597 with respect to LaBanca's charges against Daniels.[2]

The six-month limitation period commences "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984). "Therefore, where an employee sues a union for breach of its duty of fair representation, the limitations period commences when 'the plaintiff receives notice that the union will proceed no further with the grievance.' . . . Even if there has been no explicit notice, the statute of limitations begins to run when 'the futility of further union appeals became apparent or should have become apparent.' " *Vadino v. A. Valey Engineers*, 903 F.2d 253, 260 (3d Cir. 1990) (citations omitted). The facts of this case present a rather interesting twist to the issue of when the cause of action accrued because Daniels' breach of the duty of fair representation claim in effect challenges the grievance procedure itself as being discriminatory. The transcript from the union hearing is replete with Daniels' accusations that the union was treating him in a discriminatory manner with respect to the charges being processed against him and in the union's failure to allow Daniels to file charges against LaBanca arising out of the same incident. Daniels' claim, however, attacks the union's discriminatory treatment of him throughout the period prior to the hearing, during the hearing and the union's processing of his appeal. So it is impossible to assign a single date for the accrual of Daniels' breach of the duty of fair representation claim during the grievance procedure. The Court is persuaded that the relevant date must be the date upon which Daniels received notice that the union would no longer pursue his claim, in February of 1984, well within the six-month limitation period. Therefore, the defendant's post-trial motion with respect to the section 301 claim must be denied.

B. *Section 1981 Claim*

Local 597's motion with respect to the section 1981 claim is also denied. Local 597 argues that retroactive application of the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), forecloses Daniels' section 1981 claim.[3] The Patterson decision has been applied retroactively by the Seventh Circuit. *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *but see, Gillespie v. First Interstate Bank of Wisconsin Southeast*, 717 F.Supp. 649 (E.D. Wisc. 1989). The *Patterson* decision, however, is not applicable to the facts of this case. In *Patterson*, 109 S.Ct. at 2373 (emphasis supplied), the Supreme Court stated: "[section 1981] also covers wholly *private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract. Following this principle, and consistent with our holding in *Runyon* that § 1981 applies to private conduct, *we have held that certain private entities such as labor unions, which bear explicit responsibilities to process grievances, press claims, and represent member[s] in disputes over the terms of binding obligations that run from the employer to the employee, are subject to liability under § 1981 for racial discrimination in the enforcement of labor contracts.*" *Patterson* did not affect that rule of law. In this case, Daniels presented evidence that the union discriminated between Daniels and LaBanca in the processing of the grievance which led to Daniels' expulsion from the union. Daniels also presented evidence that the union discriminated against him and other blacks in providing referrals for jobs through the information hall. The information hall was established and operated pursuant to the collective bargaining agreement. The col-

lective bargaining agreement prohibited racial discrimination in the operation of the information hall. Daniels' claim is actionable under section 1981 and accordingly, the Court rejects this ground for post-trial relief as well.

C. *Excessive Damages and Punitive Damages*

Local 597 argues that the compensatory damages awarded by the jury were excessive. Those damages included the backpay and damages for emotional distress that the jury considered appropriate as to the section 1981 claim, as well as compensatory damages awarded as to the section 301 claim. Daniels presented evidence that he was entitled to approximately $109,000.00 in backpay, including offsets for other income.[4] The jury's award of $181,063.50 in compensatory damages can hardly be characterized as excessive in light of the backpay figures and the fact that the jury assessed damages for emotional distress, which is a determination that is "inescapably judgmental and subjective to a large degree, and to that degree therefore discretionary. . ." *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1425 (7th Cir. 1986).

Local 597's argument that the punitive damages in the amount of $150,000.00 are excessive is also without merit. The jury obviously considered the racial discrimination committed by the defendant to be reprehensible, especially in light of the fact that Local 597, as the plaintiff's labor union, owed Daniels a duty of fair representation, which includes equal treatment of all union members. This Court is not prepared to set aside the jury's determination that $150,000.00 is an adequate award of punitive damages in light of the defendant's conduct. Accordingly, the Court denies Local 597's motion for judgment notwithstanding the verdict or, alternatively, a new trial, in its entirety.

IV. DAMAGES

A. *Backpay, Reinstatment and Front Pay*

A prevailing plaintiff is presumptively entitled to an award of backpay and reinstatement. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Here, the jury awarded Daniels backpay on his section 1981 claim for a period which included the period of time at issue with respect to his Title VII claim. The Court declines to award the same damages twice. Therefore, backpay will not be awarded in duplicate as to the Title VII claim.

Reinstatement, however, is entirely appropriate. In most Title VII cases, the parties' relationship was or is that of employer and employee. "Courts of equity traditionally have refused to order specific performance of employment contracts, because it is difficult and time-consuming for a court to supervise the parties' conduct in an ongoing and possibly long-term relationship of employment." *McKnight v. General Motors Corporation*, No. 89-1379 (7th Cir. July 2, 1990). The same concerns do not arise in the context of union membership. Daniels reinstatement in Local 597 will not require the parties to engage in the same kind of relationship as in the employer-employee context. Moreover, although the plaintiff did find other employment in April of 1984, that employment was not equivalent in terms of the skills used, nor is it economically as rewarding as Daniels' former work. Finally, in order to gain employment in the pipefitting trade, Daniels must be at least eligible for union membership. Accordingly, the Court finds that reinstatement is a proper remedy. Local 597 is ordered to reinstate Daniels immediately, effective retroactively to the date that Daniels was expelled from the union.

The Court also notes that the plaintiff requested an award of front pay in his motion for interim equitable relief. The Court declines to make such an award because the Court has determined that reinstatement is an appropriate remedy. Reinstatement will make the plaintiff whole and front pay is appropriately awarded only where reinstatement is not feasible. *McKnight v. General Motors Corporation*, 908 F.2d 104 (7th Cir. 1990); *Hybert v. The Hearst Corporation*, 900 F.2d 1050 (7th Cir. 1990) (ADEA).

B. *Other Benefits*

Daniels failed to present evidence of any benefits at trial other than wages, although Daniels proposes a finding that he is entitled to other benefits. Accordingly, the Court does not award damages for any lost benefits, such as pension, health, overtime or vacation benefits.

C. *Injunctive Relief*

Daniels also requests that the Court award him further relief in the form of injunctive relief. Daniels would like the Court to order Local 597 to implement a new system for referral of union members to jobs. Daniels' suggested system is appended to his proposed findings of fact and conclusions of law. The defendant did not submit a proposed referral system. The Court has already found that the referral system was operated, during the time relevant to this action in a racially, discriminatory manner. The Court declines, however, to adopt the plaintiff's suggested system, without further consideration of the ramifications of such a system, including its effect on the present collective bargaining agreement and Local 597's performance thereunder. Rather, the Court will appoint a special master pursuant to Federal Rule of Civil Procedure 53 to consider not only the plaintiff's proposed

referral system, but also any objection to that system raised by the defendant, any alternate system proposed by the defendant, and to oversee the implementation of the system the special master determines to be appropriate. Therefore, the Court defers entry of final, injunctive relief with respect to the defendant's referral system, pending the appointment and report of the special master to be appointed by separate minute order.

D. *Prejudgment Interest*:

Daniels requests that the Court award prejudgment interest as to the jury's verdict.

> "[P]rejudgment interest is part of full compensation under other statutes, necessary to carry out the federal policies of compensation and deterrence . . . money today is simply not a full substitute for the same sum that should have been paid some time ago. Prejudgment interest therefore must be an ordinary part of any award of back pay (or other incurred expense) under § 1981."

Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1297 (7th Cir. 1987). If the Court determines that the amount of backpay was "readily determinable", an award of prejudgment interest is appropriate. *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 898 F.2d 512 (7th Cir. 1990). The problem presented in this case is that the jury returned a general verdict which included compensatory damages for backpay and emotional distress. The plaintiff requested $109,000.00 in backpay and $100,000.00 in emotional distress. The award for compensatory damages was in the amount of $181,063.50. Unfortunately, the amount of damages assessed by the jury for backpay and emotional distress, individually, is not readily ascertainable. Not only is a claim for emotional distress highly subjective, *see Hunter v. Allis-Chalmers Corp.*, 797 F.2d

1417, 1425 (7th Cir. 1986), but also the amount of backpay awarded was, prior to trial and is, following the verdict, not readily ascertainable. That is because a number of issues were necessarily determined by the jury in awarding backpay, but the Court has no means to determine how the jury resolved those issues. For example, the jury determined the number of hours that Daniels might have worked, but for the racially discriminatory operation of the hiring hall, as well as the amount of any offsets. The Court does not know how those issues were resolved. Accordingly, because the amount of backpay awarded can not be determined, the Court declines tc award prejudgment interest. *Donnelly v. Yellow Freight System, Inc.*, 874 F.2d 402, 411 (7th Cir. 1989), *aff'd*, ___ U.S. ___, 110 S.Ct. 1566 (1990).

V. ATTORNEYS' FEES AND COSTS

A. *Attorneys' Fees*

1. *Timeliness of the Petition:*

Daniels argues that he is entitled to an award of attorneys' fees as the prevailing plaintiff in an action to enforce the provisions of Title VII, section 1981 and section 301. 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988; and 29 U.S.C. § 185 *et seq.* Local 597 responds that section 301 does not provide a basis for an award of fees and that in any event, plaintiff's petition is not timely filed under Local Rule 46 of this Court. Local 597 is correct in its contention that no statute authorizes an award of attorneys' fees under section 301 of the LMRA. *Local 232, Allied Industrial Workers v. Briggs & Stratton*, 837 F.2d 782, 789 (7th Cir. 1988). Local 597's contention that the petition is untimely under Local Rule 46, however, must be rejected.

Local Rule 46 provides:

> A petition for attorney's fees in a civil proceeding shall be filed within ninety days of the entry of final judgment, provided that the court upon written motion and for good cause shown may extend the time. A petition for fees shall be denied if it is not filed within the period established by this rule.

Plaintiff petitions for attorneys' fees pursuant to 42 U.S.C. § 1988, as to his section 1981 claim, and 42 U.S.C. § 2000e-5(k), as to his Title VII claim. In essence, Local 597's argument is that the judgment was final when the jury returned a verdict as to the section 1981 claim, causing the ninety-day period to commence during which plaintiff had to file his petition. Local 597's argument ignores the fact that this Court had not yet ruled on the Title VII claim and thus, final judgment has not been entered in this case.

Moreover, even if the plaintiff's petition was not timely as to the section 1981 claim, it certainly is as to the Title VII claim, which arises from the same set of facts. *Nanetti v. University of Illinois*, 867 F.2d 990 (7th Cir. 1989) (same standard for award of attorneys' fees under § 1988 and Title VII). Therefore, the Court concludes that plaintiff's petition is timely.

2. *Excessiveness of Fees*:

a. *Billing Rate*:

The plaintiff argues that the appropriate billing rate for both of plaintiff's attorneys is $175.00 per hour. Defendant's opposition to this rate focuses on the difference between historic and current rates, arguing that a fee petition that Ms. Potter submitted in a case pending before Judge Bua, at approximately the same time this case was tried, requested a lower rate for legal work performed at the same time as much of the work performed in this

case. While defendant's argument is not without merit, it fails to recognize that plaintiff should be compensated for the delay in receipt of fees. The plaintiff's submission of the affidavits of other attorneys experienced in civil rights cases from the Chicago area supporting the $175.00 per hour billing rate and plaintiff's counsels' experience merits the application of the requested rate.

b. *Telephone Entries*:

Local 597's arguments with respect to the excessiveness of the plaintiff's counsels' fees, however, are not without merit. Plaintiff's counsels' time entries are not only overly general, but also many give the Court no indication as to the subject matter of the task. The majority of the telephone time billed simply identifies the other party to the conversation, without any mention of the subject matter of the call. The Court has no means of evaluating the reasonableness of these telephone entries. Therefore, those telephone entries for which the subject matter of the conversation is not indicated are disallowed.[5] The list of the disallowed entries, separated by lawyer and paralegal, and the amounts of time, appears in the Appendix to this opinion under the heading "disallowed telephone calls".

c. *Conference Entries*:

Local 597 objects to the amount of time that Ms. Potter spent conferring. The defendant's objection is that Ms. Potter spent more than one quarter of her total time billed in conferences, which is a less complex task for which Ms. Potter should not receive the lodestar rate of $175.00 per hour. The defendant's objection to the total amount of conference time and billing rate is not as compelling as examination of the conference time billing entries, individually. The same deficiency noted above with respect to the telephone billings also exists with respect

to both of the plaintiff's attorneys' billings for conferences. More often than not, the attorneys identify the person with whom they conferred, without providing the Court with the subject matter of the meeting, thereby foreclosing any determination of the reasonableness of the billings. The Court is left to divine the subject matter through the identity of the parties to the conference and the timing of the meeting. That is something the Court has neither the time nor inclination to do. Therefore, the list of disallowed entries, separated by lawyer and the amounts of time, appears in the Appendix to this opinion under the heading "disallowed conference time".[6] The remaining conference time entries are reasonable on their face, as they identify the parties to the conferences and the subject matter of the meetings. The Court is not willing to affix some arbitrary percentage of time allowable for conferring as urged by the defendant.[7] Therefore, the conference billings not listed in the Appendix are allowed.

One additional comment is necessary with respect to the plaintiff's attorneys' conference billings. Ms. Potter billed 1.5 hours of time for a conference she had on December 17, 1987 with a reporter employed by a local news publication. That billing was not allowed and is listed in the Appendix. The Court is compelled to single out that entry, however, as it is a good example of the quality of the fee petition submitted in this case. Apparently, not only would the plaintiff like the Court to speculate as to the subject matter of counsel's time entries, but also plaintiff expects the defendant to pay for the plaintiff's pre-trial publicity. It is the Court's opinion that pre-trial publicity is not compensable as attorneys' fees in a civil rights action.

d. *Duplication of Work and Misconduct at Trial*:

Local 597 also objects to the plaintiff's attorneys' billings for duplicative work. While the Court agrees that much of the work performed by both of the plaintiff's attorneys might have been performed by just one of the attorneys, the Court finds that the billings are not unreasonable and therefore, rejects Local 597's objection.

Finally, Local 597 argues that there should be a reduction in the fee award to reflect the plaintiff's counsels' misconduct during the trial. Local 597 sets forth the same laundry list of examples of the plaintiff's counsels' alleged misconduct that Local 597 set forth as a ground for post-trial relief. The Court rejected this same argument as a ground for a new trial, but recognizes that plaintiff's counsels' conduct did unduly lengthen the time necessary to try this case, although the defendant's counsel also engaged in similar conduct, which had the same effect. In any event, the Court considers this issue more relevant to the issue of whether the plaintiff is entitled to a multiplier. Accordingly, the plaintiff's counsels' conduct at trial is considered more fully below in the discussion as to plaintiff's request for the application of a multiplier to the lodestar award in this case. The lodestar figure, after subtraction of the disallowed fees, is $265,777.00.

B. *Multiplier*

The plaintiff requests that the Court apply a multiplier of .5 to the lodestar award in this case. The Court declines to do so because the representation required and the representation provided under the facts of this case do not merit a multiplier. The plaintiff's case against the union was straightforward and required little more than presentation to the jury. In many instances, plaintiff's counsel complicated the case and prolonged the trial. The

case was not particularly risky, many of the hours expended by counsel are not justified by counsels' records, and plaintiff's counsels' skill and reputation do not merit the application of a multiplier. *See e.g. McGuire v. Sullivan*, 873 F.2d 974, 985 (7th Cir. 1989).

C. *Costs*

Local 597 next argues that Daniels should not be able to recover his expert witness' fees in excess of the witness fees allowable pursuant to 28 U.S.C. § 1821. The Seventh Circuit's opinion in *Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), puts that argument to rest. The expert's fees are compensable.

Local 597 also objects to the copying costs set forth in plaintiff's petition as excessive. The defendant objects to the amount charged per copy in the petition. Plaintiff requests .20 cents per copy and defendant argues that reasonable copying *costs* are .06 cents per page, even though private law firms may charge their clients .20 cents or more and profit from the rate. Moreover, Local 597 provides examples of copying shops located in the City of Chicago which charge substantially lower rates than the rate requested by the plaintiff. The Court agrees with the defendant. The purpose of the statute is to obtain the costs reasonably incurred in the prosecution of the action, not profit. Therefore, the Court allows the plaintiff copying costs in the amount of .06 cents per page.

The next objection to the plaintiff's copying costs is raised by the Court. "Copies of papers necessarily obtained for use in the case" are recoverable pursuant to 28 U.S.C. § 1920. The Seventh Circuit has held that the phrase "for use in the case" means for use in presenting evidence in court. *McIlveen v. Stone Container Corp.*, No. 88-1778 (7th Cir. August 28, 1990). Most of plaintiff's rec-

ords are insufficient to meet that standard. Therefore, rather than set forth the copying costs which are disallowed, the following is a list of the allowed copying charges separated by lawyer and date:

	Date:	No. of Copies:
1. Potter:	09/11/87	165
	10/09/87	233
	10/09/87	221
	10/14/87	142
	10/15/87	213
	10/20/87	468
	10/29/87	433
	12/02/87	111
	12/04/87	1,083
	06/24/88	116
	06/24/88	500
	06/27/88	40
	06/29/88	1,000
2. Stainthorp:	10/01/86	72
	11/20/86	120
	06/09/88	242
	06/15/88	216
	TOTAL	5,375
		× .06
		$322.50

The allowed copying charges are the only entries which provide any information which allows the Court to conclude that the costs were incurred for use in the plaintiff's case at trial.

The Court also disallows three items of expense which are not explained in the bills of costs. The first two items appear in Ms. Potter's bill of costs. The July 28, 1988 entry in the amount of $385.00 for computer rental will not be allowed, nor will the May 9, 1989 payment to Local

597 in the amount of $52.00 for dues. Neither of these entries are supported in the petition to give the Court any indication as to the reasonableness of those costs. Mr. Stainthorp's October 22, 1987 entry for $50.00 paid to the Clerk of the Circuit Court will also not be allowed. Again, no explanation is provided for this cost. Accordingly, the total amount of costs allowed is $6,312.10.

VI. CONCLUSION

For the reasons set forth in this opinion, Local 597's post-trial motion for judgment notwithstanding the verdict, or alternatively, for a new trial is denied. The Court also enters judgment in favor of the plaintiff with respect to the Title VII claim. The defendant is directed to reinstate the plaintiff immediately, retroactive to the date of his expulsion from the union. The Court also finds injunctive relief is appropriate as to the operation of the information hall. The Court will appoint a special master to consider the appropriate system to be implemented by separate minute order. The Court also awards plaintiff attorneys fees in the amount of $265,777.00 and costs in the amount of $6,312.10. Finally, pursuant to Federal Rule of Civil Procedure 54(b), the Court finds that although the issue of injunctive relief is still outstanding, there is no just reason for delay and judgment shall be entered. Delay would impose undue hardship upon the plaintiff.

/s/ JAMES H. ALESIA
JAMES H. ALESIA
United States District Judge

Dated: September 13, 1990

[1] The only issue raised in the motion for judgment notwithstanding the verdict that does not challenge the sufficiency of the evidence is the issue of whether or not Daniels' Section 301 claim was timely filed. Because that is an issue of law to be determined by the Court, it is addressed in the Court's legal discussion within.

[2] The Court also notes that because Daniels was expelled from the union as of September of 1983, he may not argue that the other discriminatory practices alleged in the Complaint occurred during the six-month limitation period. In other words, Daniels can not argue that Local 597 discriminated against him in failing to refer him for employment during the limitation period because he was already expelled from the union during that period and not eligible for referrals.

[3] Local 597 raised the issue of retroactive application of *Patterson* in supplemental briefing before this Court as to Local 597's post-trial motions. The Court allowed the defendant to address the application of another recent Supreme Court case, *Wards Cove Packing Co., Inc. v. Atonio*, ____ U.S. ____, 109 S.Ct. 2115 (1989), in the supplemental briefing. Essentially, Local 597 argues that *Wards Cove* sets new standards for the admissibility and relevance of statistical evidence in disparate impact cases, which if applied to this case, would require the Court to grant a new trial. The Court summarily rejects Local 597's argument as, even if the Court were to apply *Wards Cove* to this case, plaintiff's evidence was adequate under that standard. Plaintiff's expert testified as to the appropriate "labor pool," in this instance, the union membership, *Wards Cove*, 109 S.Ct. at 2121.

[4] Local 597 argues that the jury should have offset the award of backpay with unemployment compensation Daniels received during the relevant period. The Court's recollection is that the evidence that the defendant presented as to unemployment compensation did not relate to the amount of benefits received, but rather was related to the defendant's claims that although union business agents signed Daniels' unemployment compensation forms certifying that Daniels was present at the hall seeking work, Daniels was not necessarily present for the full days on which the forms were signed. Thus, the jury may not have been presented with the necessary evidence to make such a determination. Moreover, in this Circuit, the offset of an award of backpay by the receipt of unemployment compensation is discretionary. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1428-29 (7th Cir. 1986).

[5] The Court has allowed, however, counsels' billings for telephone conversations with Daniels, as it is not unreasonable for counsel to speak periodically with a client over the telephone and report on the status of litigation. Moreover, neither the frequency nor the length of the conversations at issue appear unreasonable.

[6] Again, the Court has allowed the conference time the attorneys billed for time spent conferring with Daniels, as it is reasonable to assume that a certain amount of time was necessarily expended in interviewing Daniels and in briefing him on the status of the litigation. The Court has also allowed the time spent conferring with the plaintiff's expert. Again, although plaintiff's counsel did not bother to identify the subject matter of those conferences, the Court finds the amount of time billed reasonable in light of the necessary preparation for the expert's analysis and testimony. Finally, the Court has also allowed conference time billed for meetings between Potter and Stainthorp during trial. Again, it is reasonable to assume that the plaintiff's attorneys necessarily conferred with one another during the course of the trial.

[7] The Court notes that the defendant's objection to Ms. Potter's billing over one quarter of her time for conferring appears to include Ms. Potter's time spent on the telephone. The Court has already determined that a substantial portion of Ms. Potter's telephone time should be disallowed. Therefore, although the Court has not determined the percentage of time Ms. Potter spent conferring after subtracting the disallowed telephone time, it is apparent that Local 597's objection has lost much of its force.

APPENDIX

A. Disallowed Telephone Entries:

	Date	Time Billed
1. Potter:	02/24/86	.8
	03/18/86	.4
	04/23/86	.4
	04/30/86	.2
	05/20/86	.1
	05/28/86	.1
	05/29/86	.2
	05/29/86	.2
	05/29/86	.4
	06/02/86	.8
	06/03/86	.5
	06/04/86	.5
	06/04/86	.2
	06/04/86	.1
	06/05/86	1.2
	06/11/86	.4
	06/24/86	.9
	06/30/86	.3
	07/07/86	.8
	07/07/86	.8
	08/22/86	.3
	09/08/86	.4
	09/09/86	.6
	09/13/86	.4
	09/15/86	.5
	09/16/86	.2
	09/17/86	.1
	09/26/86	.9
	09/30/86	.3
	10/02/86	.1
	10/08/86	.6
	10/08/86	.1

	Date	Time Billed
1. Potter: (cont.)	10/10/86	.2
	10/13/86	.2
	10/16/86	.2
	10/17/86	.2
	10/17/86	.3
	10/20/86	.1
	10/20/86	.1
	10/20/86	1.0
	10/22/86	.2
	10/22/86	.3
	10/27/86	.3
	10/27/86	.1
	10/27/86	.2
	10/27/86	.3
	10/28/86	.1
	10/28/86	.5
	10/29/86	.2
	11/09/86	.3
	11/18/86	.1
	11/18/86	.1
	11/19/86	.2
	11/19/86	.1
	11/20/86	.1
	11/20/86	.1
	11/24/86	.2
	12/03/86	.2
	12/05/86	.4
	12/08/86	.1
	01/05/87	.2
	01/22/87	.1
	01/23/87	.2
	02/18/87	.1
	02/26/87	.1
	03/05/87	.1
	03/10/87	.2
	07/15/87	.2
	07/16/87	.1
	09/01/87	.2

	Date	Time Billed
1. Potter: (cont.)	09/25/87	.2
	09/30/87	.2
	10/07/87	.3
	10/21/87	.1
	10/27/87	.2
	10/28/87	.2
	10/29/87	.4
	10/30/87	.5
	11/09/87	.2
	11/23/87	.5
	11/24/87	.3
	12/04/87	.4
	12/04/87	.3
	12/16/87	.3
	12/16/87	.1
	12/21/87	.4
	01/06/88	.5
	01/08/88	.6
	01/09/88	.5
	01/29/88	.4
	01/29/88	.3
	06/14/88	.4
	06/14/88	.7
	07/27/88	.4
	08/18/88	.5
	04/04/88	.2
	06/20/89	.3
	06/20/89	1.0
	09/13/89	.4
	11/09/89	.3
	03/01/90	.4
	TOTAL	33.3
2. Paralegal:	05/19/86	.4
	05/20/86	.3
	05/21/86	.5
	05/21/86	.3
	05/22/86	.3

	Date	Time Billed
2. Paralegal: (cont.)	05/22/86	.4
	05/23/86	.4
	05/28/86	.2
	05/28/86	.4
	06/04/86	.3
	06/12/86	.4
	06/12/86	.3
	06/12/86	.5
	06/16/86	1.5
	06/23/86	.8
	06/27/86	.4
	06/29/86	.4
	07/02/86	.8
	07/03/86	.2
	07/05/86	.1
	07/07/86	.8
	07/07/86	.3
	07/07/86	.1
	07/07/86	.1
	07/07/86	.1
	07/07/86	.1
	07/14/86	.1
	07/17/86	1.3
	07/17/86	.1
	07/22/86	.3
	07/22/86	.3
	07/27/86	2.3
	08/17/86	.1
	08/17/86	.1
	08/18/86	.1
	08/24/86	.6
	08/24/86	1.0
	08/24/86	.8
	08/27/86	.1
	09/02/86	.1
	09/04/86	.1
	09/05/86	.1
	09/10/86	.1
	TOTAL	17.0

	Date	Time Billed
3. Stainthorp:	04/34/86 [sic]	.4
	05/20/86	.2
	06/30/86	.3
	07/01/86	.1
	09/27/86	.5
	10/03/86	.5
	10/10/86	.2
	10/17/86	.2
	10/22/86	.2
	11/18/86	.1
	09/01/87	.2
	12/21/87	.5
	08/18/88	.5
	04/04/89	.2
	11/09/89	.3
	03/01/90	.4
	05/02/90	.5
	TOTAL	5.3

B. Disallowed Conference Entries:

	Date	Time Billed
1. Potter:	05/04/86	1.5
	05/27/86	2.4
	11/20/86	.5
	12/01/86	2.3
	01/31/87	.1
	07/29/87	2.1
	09/24/87	4.0
	10/14/87	2.0
	10/16/87	1.2
	10/29/87	3.0
	10/29/87	4.1
	10/29/87	2.8
	11/04/87	.5
	11/11/87	.5
	12/16/87	.8

		Date	Time Billed
1.	Potter: (cont.)	12/16/87	2.2
		12/17/87	.3
		12/17/87	2.0
		12/17/87	2.0
		12/17/87	1.5
		06/13/87	1.2
			TOTAL 37.0
2.	Stainthorp:	09/26/86	1.0
		09/29/86	1.0
		07/29/86	2.0
		10/16/87	4.5
		10/30/87	4.0
		10/31/87	3.5
		11/11/87	.5
		11/23/87	.5
		12/11/87	2.0
		12/16/87	2.0
		12/19/87	4.5
		06/13/88	1.5
			TOTAL 26.0

Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

No. 91-1331

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PIPEFITTER'S ASSOCIATION LOCAL UNION NO. 597,

Petitioner,

v.

FRANK DANIELS,

Respondent.

Petition for Writ of Certiorari
To The United States Court
of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN L. STAINTHORP
People's Law Office
1180 N. Milwaukee
Chicago, IL 60622
312/235-0070

ROBIN POTTER
Potter & Schaffner
343 S. Dearborn, #1210
Chicago, IL 60604
312/341-1810

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.	1
SUMMARY OF ARGUMENT	16
REASONS WHY CERTIORARI SHOULD BE DENIED	17
I. THE PETITION FOR CERTIORARI DOES NOT AFFECT THE TITLE VII JUDGMENT WHICH IS A WHOLLY INDEPENDENT GROUND FOR THE PLAINTIFF'S VERDICT	17
II. PETITIONER WAIVED ITS OBJECTION TO THE JURY INSTRUCTION ON RETALIATION	20
III. PETITIONER WAIVED OBJECTION TO THE GENERAL VERDICT. . . .	30
CONCLUSION	33

TABLE OF AUTHORITIES

CASES

Abel v. Miller, 824 F.2d 1522 (7th Cir. 1987) 25

Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1989) 30

Chicago and Southern Airlines v. Waterman S.S. Corporation, 333 U.S. 103 (1948) 19

Corriz v. Naranjo, 667 F.2d 892 (10th Cir. 1981) 30

Davis v. Consolidated Rail Corp., 810 F.2d 679 (7th Cir. 1987). . 25

Garden v. Westinghouse Electric Corp., 850 F.2d 996 (3rd Cir. 1988) . . 31

Goodman v. Lukens Steel Co., 482 U.S. 656 22,23,28

Johnson v. Houser, 704 F.2d 1049 (8th Cir. 1983) 27

Kassel v. Gannett Co., 875 F.2d 935 (1st Cir. 1989) 31

Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980) . . 31

Malhotra v. Cotter and Co., 885 F.2d 1305 (7th Cir. 1989) . . . 22, 28

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990) . . 25

Monsma v. Central Mutual Insurance Co., 392 F.2d 49 (9th Cir. 1968) . 27

Murphy v. United States, 653 F.2d 637 (D.C. Cir. 1981). . 31

Novack Investment Co. v. Setser, 454 U.S. 1064 (1981). . . . 22

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 13

Runyon v. McCray, 427 U.S. 160 (1976) 24

Sunkist Growers Inc. v. Winckler and Smith Citrus Products Co., 370 U.S. 19 (1962) 31

Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972). 21

Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972). 30

STATUTES

42 U.S.C. §1981 (§1981) .13,20,21-25,29

29 U.S.C. §185 (§301) . . . 2,24

42 U.S.C. §1988 29

42 U.S.C. §2000e-2 (Title VII) . 2

Civil Rights Act of 1991 42 U.S.C. §2000e-5(k). . . . 29

Fed. R. Civ. P. 51 . . 26, 27,30

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent submits this statement in accordance with Sup. Ct. R. 15(1) to correct inaccuracies and omissions in the Statement of the Case by the petitioner. Specifically, petitioner fails to acknowledge in either its statement of the case or its argument that it consented to both the jury instruction to which it now objects and the general verdict which it now posits as its sole ground for relief. Furthermore, petitioner fails to point out that there is a wholly distinct ground for its liability in this matter, judgment under Title VII, which it has not asked this court to review and which would sustain the verdict for the respondent even if this court were to grant certiorari on the question presented for review.

Respondent Frank Daniels, a black pipefitter and welder, sued petitioner Pipefitters Association Local Union No. 597 (L.597), under 42 U.S.C. §1981 (§1981), 29 U.S.C. §185 (§301) and 42 U.S.C. §2000e-2 (Title VII), charging race discrimination and retaliation in denying him job referrals and expelling him from the union. On June 21, 1988, the case proceeded to trial, before a jury on the §1981 and §301 damage claims and before the court on the Title VII and §301 equitable claims. On July 6, 1988, the jury returned a general verdict in favor of the plaintiff, awarding $181,063.50 in compensatory and $150,000.00 in punitive damages. The court subsequently denied defendant's post trial motions, entered judgment against defendant on the Title

VII claims,[1] and awarded attorneys' fees and costs.

The evidence at trial established that Daniels was a qualified and competent pipefitter and welder who actively sought employment. Tr. 616, 683, 792, 299, 1363. Daniels became a full member of petitioner L.597 in 1973 and remained a member until he was expelled in 1984. App. p. 4; Tr. 1296-97. Since a fitter or welder had to be member of L.597 in order for a contractor to hire him this expulsion prevented Daniels from plying his trade. App. p. 4-5. During his membership in L.597 plaintiff was a constant critic of its racial practices and filed numerous

---

[1]The judgment ordered further proceedings with respect to injunctive relief and appointed a special master to oversee implementation of a non-discriminatory job referral system, but entered a Rule 54 certification and directed entry of final judgment as to the balance of the judgment.

complaints against it, including charges with the National Labor Relations Board, the Illinois Fair Employment Practices Commission, the Illinios Department of Human Rights, and the Equal Employment Opportunity Commission. App. p. 4.

Petitioner L.597 is the exclusive bargaining agent for pipefitters and welders in northern Illinois and Indiana and had entered into a collective bargaining agreement wherein employers were obligated to hire only L.597 members. The contract also provided that employers were to notify the union of employment opportunities and that the union would refer qualified applicants. App. p. 4; Pl Ex. 11, Art. X §2, §3(a)(b). The contract barred L.597 from discriminating in referrals on the basis of the applicant's race, color, national origin, creed or sex. App. p. 4; Pl. Ex. 11, Art. X, §5.

In accordance with the collective bargaining agreement L.597 established a job referral hall which was an important source of jobs for its members. The largest contractor in the area, Philips and Getschow, which at times employed as many as one third of the members of L.597, hired only workers referred from the hall. Tr. 303-04. L.597 would refer only the number of workers requested, so a referral ensured a job. Tr. 297.

Before this court, and the Court of Appeals, L.597 attempts to misrepresent the evidence in the case and downplay the importance of the referral system. Pet. p. 2-3. The Court of appeals rejected this misrepresentation, finding that the referral system was "an important source of jobs" (App. p. 5), "an indispensable step in a union member's efforts to obtain a position" (App. p. 12), "the primary

mechanism through which contractors hired union employees pursuant to the Area Agreement," (App. p. 12) and noting that "in essence no referral meant no job and no opportunity for union members to enter into employment contracts with employers." App. p. 12. The Court of Appeals further held that "For blacks, the referral system was particularly critical, for the promise of non-discriminatory job referrals as guaranteed by the collective bargaining agreement meant that employers could not choose employees on the basis of race. An unbiased referral system would have assisted black union members in overcoming the racism they might have faced were they required to apply for positions on their own. Moreover, a referral system free of discrimination's taint would open additional doors of opportunity to blacks who because of their historic exclusion

from the industry, lacked the personal contacts to hear about job openings through other means." App. p. 12; Tr. 735, 641.

The evidence showed that the referral system operated by L.597 denied a fair allocation of jobs to blacks in general and Daniels in particular. Daniels and other witnesses testified that jobs were often secretly dispatched out the back door or over the telephone, even when members were present in the hall waiting for referrals. When jobs were supposed to be assigned on a random basis, by picking names out of a hat, Daniels never got a job. Tr. 1314, 1481-84. On several occasions agents of L.597 signed the plaintiff's unemployment card to indicate no work was available when their dispatch records showed that many jobs were dispatched. App. p. 7; Pl. Ex. 3,4,5, Tr.

837-43, 1353. The evidence showed that L.597 was hostile to Daniels because he was black, Tr. 1301-03, 617-18, and because he had filed numerous race discrimination charges against the union. Tr. 614, 1320-21, 1331, 1336.

Plaintiff also introduced uncontroverted expert testimony that blacks received much fewer job referrals than they should relative to their population in the referral hall. The expert, an assistant professor at the University of Chicago who specialized in quantative methodology and labor force dynamics, examined data from dispatch and manpower records. He concluded that the disparity in referral rates could not have occurred by chance but could be caused by a discriminatory selection mechanism. App. p. 7; Tr. 1238-1259.

In addition to evidence showing

discrimination in the referral system plaintiff also introduced evidence of L.597's long hostility towards blacks. In the early 1970's the union resisted the federal government's attempts to open up the trade to minorities, urging members to demonstrate against blacks coming into the union and then grudgingly telling its members they had to accept blacks because of "big brother government." Tr. 1140, 1144. Though the union entered into a consent decree setting forth specific goals for the increase of black and spanish members these goals were never met and the percentage of black members actually declined. Pl. Ex. 15; Tr. 112-13. In 1983 the head of the union declared to a black man running for union office that L.597 had been a "white man's union." Tr. 810-12. There was also a history of racial slurs, both in general

and directed at the plaintiff. Tr. 1144-50, 1302-03.

In 1984 the union expelled the plaintiff, claiming he had hit a business agent. The evidence showed that the union's expulsion hearing was a sham, presided over by a union officer who had previously called plaintiff a "nigger" and had tried to prevent him from joining the union. Tr. 1300-01. The union claimed that Daniels was proven guilty "beyond a reasonable doubt" despite the fact that he was acquitted of the identical charge by a jury in criminal court and despite the fact that the evidence showed Daniels had acted in self-defense and had caused no injury to the agent. Tr. 1494-97, 401-407. The plaintiff alleged at the hearing that the charges and hearing were further discrimination against him. Tr. 159-161.

At trial the jury was instructed that

it could find liability against the defendant under §1981 either on the ground that L.597 racially discriminated against the plaintiff by refusing him job referrals, interfering with his ability to get work and failing to properly represent him, because he was black, or on the ground that L.597 expelled the plaintiff from the union because he had previously filed charges of race discrimination. L.597 agreed to both §1981 jury instructions including that on retaliation. The jury was also instructed on §301 and to return a general verdict, either for the plaintiff or for the defendant. L.597 agreed to this general verdict and withdrew its special interrogatories. Tr. 1859, 1856. The jury then returned its verdict in favor of the plaintiff.

After further briefing the court

issued its findings on plaintiff's Title VII claims. (App. 39-47) Under Title VII plaintiff had two claims: 1) that L.597 intentionally discriminated against Daniels in failing to refer Daniels for employment; and 2) that the referral system operated by L.597 had a disparate impact on blacks in general and Daniels in particular. Daniels brought no claim under Title VII in regards to his expulsion from the union. The District Court found for the plaintiff on both grounds under Title VII, finding intentional discrimination and disparate impact. App. p.46, par. 8. The court made specific factual findings in support of each ground of liability. App. p.39-44.

The Seventh Circuit Court of Appeals affirmed the judgments under §1981, §301 and Title VII. The court held that

L.597's discriminatory refusal to refer Daniels for jobs deprived him of the ability to enter into contracts with employers and violated the express terms of the collective bargaining agreement, thus violating §1981 as it was reinterpreted in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). App. p. 9-15. The court further held that even though the jury should have been instructed that retaliation must be racially motivated to violate §1981, L.597's discrimination in the formation of contracts and enforcement of the collective bargaining agreement provided independent bases for affirming §1981 liability. App. p. 20. The court then affirmed §301 liability, holding that "the evidence is rife with evidence that the union intentionally discriminated in the operation of its referral system and

intentionally ignored (plaintiff's) many grievances." App. p. 27. The court then affirmed the Title VII judgment under both disparate treatment and disparate impact theories, holding that "Although the district court adopted the jury's findings of fact, it made additional findings of its own sufficient to support liability under a theory of disparate impact." App. p. 30. The court agreed with the District Court that the evidence regarding the statistical disparities in referrals was "concise, very credible, and uncontroverted" App. p. 31, and upheld the finding of the District Court that "Daniels was subjected to discrimination by the Business Agents responsible for referrals" and that L.597 was thus liable for racial harassment under Title VII. App. p. 32.

L.597's Petition for Rehearing and

Suggestion for Rehearing en Banc was denied and L.597 has now petitioned for certiorari, presenting as the sole question the appropriate course of action for a reviewing court when it affirms liability on several theories but finds error as to one.

SUMMARY OF ARGUMENT

Review should be denied because the verdict against L.597 under Title VII is an independent ground for liability which would be unaffected even if this court were to grant the Petition for Certiorari; and because L.597 waived all objections to the retaliation jury instruction and general verdict to which it now objects.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE PETITION FOR CERTIORARI DOES NOT AFFECT THE TITLE VII JUDGMENT WHICH IS A WHOLLY INDEPENDENT GROUND FOR THE PLAINTIFF'S VERDICT

Because the respondent won on his Title VII claims of disparate treatment and disparate impact, and because the Petition for Certiorari raises no challenge to that judgment, this court should decline to review the case since even if the petitioner were successful there are independent grounds to sustain the liability verdict in favor of the respondent.

The trial judge made comprehensive findings of fact and conclusions of law upholding respondent's Title VII claim under disparate treatment and disparate impact theories. On appeal to the Seventh

Circuit L.597 challenged those findings, claiming that the District Court erred because, it claimed, the judge did not make independent findings of fact but relied on the jury's verdict. The Court of Appeals rejected this argument, adhering to the "well settled" rule that "a jury's verdict, when §1981 and Title VII claims are tried simultaneously, binds the judge on factual issues common to both claims." App. p. 29. The Court of Appeals also held that the District Court "made additional findings of its own sufficient to support liability under a theory of disparate impact" App. p. 30, and "made findings sufficient to sustain Daniels' claim of racial harassment due to a hostile work environment under Title VII." App. p. 31. Petitioner L.597 has not asked this court to review these holdings and therefore the Title VII

judgment of liability is now final.

It is basic that this court will decide only "cases" and "controversies," United States Constitution Article III, and will not issue advisory opinions. Chicago and Southern Airlines v. Waterman S.S. Corporation, 333 U.S. 103 (1948). Here, there is no longer any case or controversy concerning L.597's liability for discriminating against Daniels. The case is over and Daniels has prevailed, at least under Title VII. Though reversal of the original §1981 verdict might affect the amount of damages recovered by Daniels[2] it will not affect its substantial liability for lost wages and attorneys' fees.

Review of this case in its present

---

[2]Daniels was awarded punitive damages and damages for pain and suffering, which are not available under Title VII, as well as damages for backpay.

posture would thus be an unwise use of substantial judicial resources that would not affect L.597's liability, and for this reason review on certiorari should be denied.

2.

PETITIONER WAIVED ITS OBJECTION TO THE JURY INSTRUCTION ON RETALIATION

Because the Petition for Certiorari is wholly dependent on a holding that the jury was wrongly instructed on respondent's retaliation claim, and because petitioner waived this issue by failing to object to that instruction, review on certiorari should be denied.

At trial Petitioner agreed that the jury should be instructed to return a §1981 verdict for Daniels if he proved that L.597 expelled him in retaliation for filing prior charges of race

discrimination. This was a change of strategy by L.597. Prior to trial petitioner had indicated it would try to have the retaliation claim dismissed, arguing in its trial brief that "discharge of an employee for bringing charges under Title VII is not a violation of §1981," R.82, p. 12, and listing as authority an unreversed and frequently cited decision from the district in which the trial was held, Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972). At trial petitioner abandoned this defense and agreed to have the retaliation claim, and thus evidence that Daniels had been involved in a physical fight with a Business Agent, heard by the jury.

At the time of the trial of this matter it was an open question whether retaliation could constitute a claim under §1981 and, if so, what the contours of

that potential liability were. Three members of this court had recognized that the issue was undecided in Novack Inv. Co. v. Setser, 454 U.S. 1064, 1065 n.1 (1981) (White, J., joined by Brennan and Marshall JJ., dissenting from Court's denial of certiorari and declining to review "at this time" whether retaliation could be a §1981 violation). The Seventh Circuit Court of Appeals had upheld a verdict based in part on retaliation, but the parties in that case had not contested the viability of that claim. Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1420 (7th Cir. 1986); Malhotra v. Cotter and Co., 885 F.2d 1305, 1313 (7th Cir. 1989).

In addition, in 1986 this court in Goodman v. Lukens Steel Co., 482 U.S. 656 discussed whether racial animus was necessary to find §1981 liability. The majority held it was not, holding that a

union's failure to process discrimination claims violated §1981 "regardless of whether, as a subjective matter, its leaders were favorably disposed towards minorities." 482 U.S. at 669. Three justices dissented on this issue, arguing that §1981 liability always necessitated a showing of intentional race discrimination. The dissenters' arguments would have provided support for L.597 if it had chosen to present its arguments on retaliation to the District Court; if intentional race discrimination were necessary to find liability for failure to process grievances then it should also be necessary to find liability for expulsion from a union and violation of a collective bargaining agreement.[3]

---

[3]Conversely, of course, the majority opinion in Goodman supports respondent's argument that retaliation per se, without additional proof of racial animus, is a

Moreover, at the time of trial this court had already enlarged its scope of review in Patterson to include the question:

> Whether or not the interpretation of 42 U.S.C. §1981 adopted by the court in Runyon v. McCray, 427 U.S. 160 (1976), should be reconsidered?

108 S. Ct. 1419 (April 28, 1988). This order, and the fierce dissent it provoked, 108 S. Ct. at 1421-23, demonstrated that this court might reconsider and drastically limit the scope of §1981. The order for reargument in Patterson made it reasonable to anticipate that this Court might hold §1981 inapplicable to retaliation claims and gave the defendant "plenty of time in which to mount a timely challenge to the applicability of §1981."

---

§1981 violation. In the event this court accepts this case for review respondent will develop this issue further.

McKnight v. General Motors Corp., 908 F.2d 104, 108 (7th Cir. 1990) Thus, petitioner had ample notice that a legal challenge to plaintiff's retaliation claim might be successful.

Petitioner decided not to pursue that challenge, apparently calculating that the jury would not favor a plaintiff who, it claimed, started a fight. Evidently the strategy backfired and the jury was more impressed with the blatant unfairness and pretextual nature of the union's show trial than with the fleeting contact between Daniels and the Business Agent. Having made this strategic decision, however, petitioner has clearly waived any possible argument that retaliation is not a valid §1981 claim. Davis v. Consolidated Rail Corp., 810 F.2d 679, 684 (7th Cir. 1987); Abel v. Miller, 824 F.2d 1522, 1535 (7th Cir. 1987).

The Seventh Circuit recognized that L.597 had not objected to the retaliation instruction, as required by Fed. R. Civ. P. 51, but considered the claim anyhow on the basis that there is a narrow exception to the rule where an intervening Supreme Court case changes the law and "Patterson and its progeny have made it more difficult for plaintiffs to bring a successful retaliation claim." App. p. 20. The Seventh Circuit's decision to consider the waived claim was not justified.

Fed. R. Civ. P. 51 performs an important role in forcing parties to be explicit as to the exact nature of their legal claims and the exact nature of the objection to those claims. Any objection that is not "distinctly" made is, by the express terms of the Rule, abandoned.

Thus, the rule's intent is to prevent

a party from adopting one legal strategy at trial and a contrary one on appeal. Its strict application forces a party to make final decisions about what legal issues it wishes to contest and those which it prefers to remain in the case. The rule protects the parties and the legal system against the cost and energy involved in numerous re-trials and fixes the attention of the litigants on the importance of a properly instructed jury. Monsma v. Central Mutual Insurance Co., 392 F.2d 49 (9th Cir. 1968); Johnson v. Houser, 704 F.2d 1049 (8th Cir. 1983).

Here, the requirements of Fed. R. Civ. P. 51 should not be waived because Patterson did not work any unforeseen change in §1981 retaliation law and may well have worked no change at all. Patterson undoubtedly changed §1981 law by restricting it to discrimination in the

making and enforcement of contracts, but it did not discuss what mental state was necessary for a defendant to be found liable and did not discuss retaliation. Certainly the reasoning of Goodman v. Lukens Steel Co., 482 U.S. 656, a case cited with approval by the Patterson court, would support the viability of retaliation claims where there is intentional retaliation for bringing discrimination claims but no separate intentional race discrimination. See supra, p. 23-24; Malhotra v. Cotter and Co., 885 F.2d 1305, 1314 (7th Cir. 1989) (Judge Cudahy dissenting).

Moreover, even before Patterson the status of §1981 retaliation claims was unclear. In the absence of any controlling authority allowing such claims L.597 had sufficient grounds to mount a legal challenge if it had wished to do so.

At the time of trial in 1988 §1981 did not explicitly bar retaliation[4] and this court had already indicated it intended to reexamine what many considered the most basic tenets of §1981 law. Any competent attorney with a passing familiarity with employment discrimination law would recognize that the field was open for a challenge to retaliation claims. But L.597 made no such challenge.

Thus, whether or not retaliation per se was a §1981 violation in 1988 is a moot point. L.597 conceded that was and that concession should bind it now. Because petitioner previously waived this issue which is at the heart of its Petition for Certiorari this court should deny review.

---

[4]Now it does. See Civil Rights Act of 1991, 42 U.S.C. §2000e-5(k) and 42 U.S.C. §1988.

3.

PETITIONER WAIVED OBJECTION TO THE GENERAL VERDICT

This court should deny review because the Petition waived all objections to the general verdict.

In order to preserve an objection to a form of verdict a party must object at trial. Fed. R. Civ. P. 51; Arnott v. American Oil Co., 609 F.2d 873, 889 (8th Cir. 1989) ("The failure...to make objection to the general verdict form results in a waiver of such objections on appeal"); Corriz v. Naranjo, 667 F.2d 892 (10th Cir. 1981) ("The party who takes exception to the form of the verdict should make objection. He owes that to the court." at 902 (concurring opinion)); Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972).

Here, petitioner consented to the general verdict form and withdrew its previously propounded special interrogatories which would have had the jury differentiate between theories of recovery. The Petitioner thereby waived all objections to the general verdict. In each case cited by the petitioner where a general verdict was upset (Petition pp. 7-8) there is either no discussion of waiver or the party specifically objected to the form of the verdict. Sunkist Growers Inc. v. Winckler and Smith Citrus Products Co., 370 U.S. 19 (1962) (court specifically found no waiver where defendant objected to all contested jury instructions); Murphy v. United States, 653 F.2d 637, 652 fn. 71 (D.C. Cir. 1981); Kassel v. Gannett Co., 875 F.2d 935, 950 (1st Cir. 1989); Garden v. Westinghouse Electric Corp., 850 F.2d 996 (3rd Cir.

1988) (erroneous admission of evidence objected to at trial); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). Petitioner has not cited a single case where a party who has clearly agreed to a general verdict at trial has succeeded in avoiding that agreement on appeal.

Petitioner had the opportunity at trial to request a different form of verdict. It failed to make that request but rather consented to the general verdict form. It should not now be allowed to withdraw that consent.

CONCLUSION

This Court should decline to review this case because the petitioner will remain liable for race discrimination under Title VII whether or not this court grants review, and because the petitioner agreed to the jury instructions on retaliation and verdict to which it now objects and has thus waived these issues.

Respectfully submitted,

JOHN L. STAINTHORP
People's Law Office
1180 N. Milwaukee
Chicago, IL 60622
312/235-0070

ROBIN POTTER
Potter & Schaffner
343 S. Dearborn
Suite 1210
Chicago, IL 60604
312/341-1810